ARTICLES

ENFORCING CLASS ARBITRATION IN THE INTERNATIONAL SPHERE: DUE PROCESS AND PUBLIC POLICY CONCERNS

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1. INTRODUCTION

Courts, commentators, and commercial actors have long touted arbitration as the best means of resolving international commercial disputes, largely because arbitration—with its many international and regional treaties on enforcement of awards[1]—is a much more efficient and reliable means of recovering against a foreign entity than litigation is.[2] However, the international arbitral regime will soon face a new challenge as class arbitration—a United States-initiated dispute resolution mechanism that has been in existence domestically since the early 1980s[3]—becomes increasingly international.[4]

Indeed, several factors indicate that international class arbitration is on the rise.[5] First, the United States Supreme Court's

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[1] *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364; Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention]; Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter ICSID Convention], Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; *see generally* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION paras. 10-70 to 10-72 (4th ed. 2004) (comparing enforcement of arbitral awards under the New York Convention with enforcement under local laws and other agreements).

[2] *See* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 257 (2006) (arguing that implementation of the New York Convention should facilitate, rather than impede, award recognition).

[3] *See* Keating v. Superior Court, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984) (noting that the decision to order a class-wide arbitration is within the discretion of a trial court); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 39 (2000) ("Significantly, all of the supportive court decisions call upon the court to play an extremely active role in resolving the class action issues relevant to the class-wide arbitration." (writing prior to *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003) (plurality opinion)).

[4] *See, e.g.*, Stolt-Nielsen SA v. Animalfeeds Int'l Corp., 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006) (interpreting a contract clause permitting arbitration "in the City of New York or in the City of London"), *appeal docketed* (2d Cir. June 2, 2008).

[5] "International class arbitrations" can be defined in either of two ways: (1) as class arbitrations giving rise to arbitral awards that are made "in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or (2) as class arbitrations giving rise to arbitral awards "not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, *supra* note 1, art. I(1). The latter

recognition of class arbitration as a viable method of dispute resolution in *Green Tree Financial Corp. v. Bazzle*[6] and the subsequent publication of two specialized arbitral rules dealing with class arbitration[7] mean that class arbitration cannot be seen as an anomalous procedural mechanism limited to a few U.S. states. In fact, the American Arbitration Association ("AAA") has been asked to administer over 120 class arbitrations to date,[8] and an unknown number of additional class arbitrations may be proceeding on an *ad hoc* basis or under the administration of other arbitral institutions that do not publish their class arbitration dockets.[9] Second, class arbitration has been considered a potentially acceptable process outside of the U.S., which demonstrates that class arbitration is not limited to one country.[10] Third, a number of international class arbitrations seated in the United States already exist. For example, *Harvard College v. JSC Surgutneftegaz* involves a defendant based in the Russian Federation; *CBR Enterprises, LLC v. Blimpie International, Inc.* involves several U.S. defendants with significant international holdings that could be subject to international enforcement orders;

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category of arbitrations typically includes disputes involving parties from different states or involving some important nexus with a foreign state. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. § 202 (2007) (stating "a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states").

[6] 539 U.S. 444 (2003) (plurality opinion).

[7] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), http://www.adr.org/sp.asp?id=21936 (last visited Oct. 17, 2008) [hereinafter AAA SUPPLEMENTARY RULES]; JUDICIAL ARBITRATION AND MEDIATION SERVICES CLASS ACTION PROCEDURES (2005), http://www.jamsadr.com/rules/class_action.asp (last visited Oct. 17, 2008) [hereinafter JAMS CLASS ARBITRATION RULES]. The National Arbitration Forum has promulgated a set of class arbitration procedures as well, but they are somewhat less detailed and will not be discussed at length herein. *See* National Arbitration Forum, *Class Arbitration Procedures*, http://www.adrforum.com/users/naf/resources/Arbitration%20Class%20Procedures%202007.pdf (last visited Oct. 29, 2008).

[8] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 70 (2007).

[9] *See, e.g.*, Stolt-Nielsen SA, 435 F.Supp. 2d at 382 (concerning a potential ad hoc class arbitration); Pedcor Mgmt. Co., Inc. v. Nations Pers. of Tex., Inc., 343 F.3d 355 (5th Cir. 2003) (same).

[10] *See infra* notes 228–52 and accompanying text.

and *Bagpeddler.com v. U.S. Bancorp* could include non-U.S. plaintiffs as part of its class of up to 400,000 internet vendors.[11]

This Article is the first known commentary to discuss the types of issues that are beginning to face the international arbitral community. Furthermore, no known law review article or scholarly treatise acknowledges the possibility of class arbitrations taking place outside the United States. However, this Article identifies several reported decisions from outside the United States that shed light on the extent to which international class arbitration will be considered a legitimate endeavor.[12]

Although international class arbitration raises many issues,[13] this Article focuses on fundamental conceptual objections that can

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[11] Harvard College v. JSC Surgutneftegaz, Case No. 11 168 T 01654 04 (Am. Arbitration Ass'n, Aug. 1, 2007), *available at* http://www.adr.org/si.asp?id=5032; CBR Enter., LLC v. Blimpie Int'l, Inc. (Am. Arbitration Ass'n, Apr. 19, 2006), *available at* http://www.adr.org/si.asp?id=3929; Bagpeddler.com v. U.S. Bancorp, Case No. 11 181 0032204 (Am. Arbitration Ass'n, May 4, 2007), *available at* http://www.adr.org/si.asp?id=4667; *see also* Harvard College v. JSC Surgutneftegaz, No. 04-6069, 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007) (confirming international class arbitration award); Pedcor Mgmt. Co., Inc., 343 F.3d at 362 n.31 (concerning potential international class arbitration); President and Fellows of Harvard College Against JSC Surgutneftegaz, 770 PLI/LIT 127 (2008) (reproducing partial final award on clause construction).

[12] *See* Dell Computer Corp. v. Union des consommateurs (not indicated v. Can.), [2005] Q.C.C.A. 570, *rev'd*, [2007] 2 S.C.R. 801, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www .kluwerarbitration.com; Kanitz v. Rogers Cable Inc. (Can. v. Can.), [2002] 58 O.R. (3d) 299, 21 B.L.R. (3d) 104, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www.kluwerarbitration.com; Valencia v. Bancolombia (Colom. v. Colom.), *digest by* Zuleta DIGEST for Institute for Transnational Arbitration (ITA) (Arb. Trib. from the Bogotá Chamber of Comm., 2003), *available at* http://www.kluwerarbitration.com; *see also infra* notes 228–52 and accompanying text. It is possible that there are other domestic class arbitrations that are not reflected in the international arbitral reporting series.

[13] For example, objections to class arbitration might be based on arguments typically made when opposing consolidated proceedings. *See* S.I. Strong, *Consolidation and Class Arbitration in the International Realm: Analogous or Anomalous?* (forthcoming). However, objections based on analogies to consolidation focus heavily on efficiency rationales and concerns about party intent and consent. *See* Stolt-Nielsen SA v. Animalfeeds Int'l Corp., 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006) (discussing court's interpretation of policy rationales concerning consolidation), *appeal docketed* (2d Cir. June 2, 2008); REDFERN & HUNTER, *supra* note 1, paras. 3-82 to 3-85 (describing the practical and legal problems associated with consolidation of arbitrations); Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 111–18 (1995) (discussing how contractual provisions affect the possibility of consolidation). Other objections to class arbitration may be based on contract law, focusing on purported waivers of class treatment. *See* Hans Smit,

and will likely be raised at the enforcement stage. The two most compelling arguments against international enforcement of a foreign class award are likely to be based on due process and public policy.[14] In many countries, both due process and public policy could be raised in a motion to set aside (i.e., vacate) a class award, particularly if the nation in question has modeled its arbitration laws on the 1985 United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration.[15] However, detailed discussion of the distinctions between actions to enforce an arbitral award and actions to set aside or vacate an arbitral award is outside the scope of this Article, which focuses solely on enforcement issues.

The two primary areas of concern—due process and public policy—indicate that the debate about the legitimacy of international class arbitration will take place at a fundamental level, possibly requiring a radical reconceptualization of both (1) acceptable procedure in international arbitration and (2) the nature of individual procedural rights in arbitration. First, due process concerns reflect the manner in which class arbitration challenges

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Class Actions and Their Waiver in Arbitration, 15 AM. REV. INT'L ARB. 199, 201 (2004) (discussing ability of waiver clauses to withstand contract-based challenges); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75–76 (2004) (discussing attempts by corporations to avoid class proceedings through contractual prohibitions); Weidemaier, *supra* note 8, at 85, 90, 100 (discussing prohibition of class arbitrations). Though these are interesting areas of inquiry, this Article focuses on two distinct and perhaps more fundamental concerns—due process and public policy.

[14] *See* New York Convention, *supra* note 1, arts. V(1)(b), V(2)(b) (outlining permissible grounds for objecting to the enforcement of an arbitral award). In this Article, the term "due process" is not used in its strict U.S. constitutional sense (except in the context of the U.S. class action discussion in section 2.1), but is instead used in the broader, international sense, akin to procedural justice or the English concept of natural justice. *See* John C.L. Dixon, *The* Res Judicata *Effect in England of a U.S. Class Action Settlement*, 46 INT'L & COMP. L.Q. 134, 136, 140 (1997) (discussing how concepts of natural justice affect English courts' treatment of class action judgments and settlements).

[15] UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, arts. 34(2)(a)(ii), 34(2)(b)(ii), U.N. Doc. A/40/17/Annex I (June 21, 1985) [hereinafter UNCITRAL MAL], *revised by* REVISED ARTICLES OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, arts. 34(2)(a)(ii), 34(2)(b)(ii), U.N. Doc. A/61/17/Annex I (July 7, 2006); *accord* David J.A. Cairns, *The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration*, 22 ARB. INT'L 573, 592 (2006) (discussing the Spanish approach to procedural and public policy arguments).

established norms about the arbitral process itself. International commercial arbitration developed primarily as a means of enforcing bilateral contracts, and the vast majority of its policies and procedures reflect that tradition.[16] Even multiparty (non-class) arbitration is typically viewed through the lens of a two-party procedure.[17] Class arbitrations challenge these norms due to both the size of the classes (which can include hundreds or even hundreds of thousands of parties) and their representative nature. Nevertheless, the similarities between class arbitrations and bilateral arbitrations—particularly at the policy level—outweigh the differences.[18]

This Article demonstrates that concerns about due process and public policy are not sufficient to overcome the presumption in favor of enforcement inherent in multilateral treaties such as the United Nations' 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[19] Therefore, this Article argues that awards arising out of international class arbitrations should be treated at the enforcement stage the same way as awards resulting from bilateral arbitrations, with no special blanket objections being permitted as a result of the special nature of class arbitrations.

Although further details of class procedure will be discussed below, at its core, class arbitration is a representative (class) action gone private. Class actions (which currently exist in a number of different legal systems) have been defined as "a procedural joinder device that permits one or more persons to initiate a lawsuit as a representative of all those similarly situated."[20] By analogy, therefore, a class arbitration involves "an arbitrator [or arbitral

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[16] *See* JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION para. 16-1 (2003) ("There is a general tendency to presume that arbitration involves only two parties.").

[17] *See id.* paras. 16-1 to 16-3, 16-32 (outlining the procedural difficulties created by multiparty abtritrations).

[18] *See infra* notes 370–440 and accompanying text.

[19] New York Convention, *supra* note 1; *see infra* notes 370–440 and accompanying text.

[20] Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1726 (2005–2006); *see also* RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 3 (2004) (providing similar definitions from other jurisdictions); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 334 (2003) (discussing the elements of class action suits in Brazil).

tribunal] selected and paid by the parties, rather than an elected or appointed judge, [who] presides over a class action" and thus "decides whether to certify a class, determines the form and manner of notice to class members, resolves all issues of law and fact, and enters an award that might bind many hundreds or thousands of class members."[21] A class arbitration can result when a group of individuals (1) suffers the same or similar injury and (2) has the same or similar arbitration agreement with the defendant(s).[22] Several named claimants then bring an action, on behalf of themselves and others who are similarly situated, for damages and/or for injunctive or declaratory relief.[23]

Class arbitrations are an accepted procedure within the United States, with over 120 such actions administered by one arbitration provider—the AAA—as of early 2007.[24] They have also been seen in other countries, both common and civil law.[25] Although many class arbitrations will—like class actions—involve only domestic parties, the realities of the global economy mean that international class disputes are on the rise.[26] Insurance companies, financial institutions and manufacturers are only some of the types of corporate defendants who will find themselves subject to demands for class arbitration.[27] Furthermore, international arbitration is expected to increase in several areas of law, including the fields of consumer, employment and e-commerce law.[28]

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[21] Weidemaier, *supra* note 8, at 70. Many international arbitrations consist of a panel of three arbitrators. However, for ease of discussion, this Article refers to the arbitrator in the singular.

[22] *See infra* note 180 and accompanying text.

[23] *See infra* note 180 and accompanying text.

[24] Weidemaier, *supra* note 8, at 70; *see also* BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 257–79 (2005) (discussing generally the practice of class arbitrations in the United States).

[25] *See infra* notes 228–52 and accompanying text.

[26] *See* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 301 (2007) [hereinafter Baumgartner 1] (discussing the rise of international class actions).

[27] *See* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 301 (2004) [hereinafter Buckner 1] (discussing areas of law where class actions and class arbitrations are common); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 407 (2002) (same).

[28] *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 250–55 (2006) [hereinafter Drahozal 1]

As class arbitrations develop internationally, questions will arise about how these proceedings should be structured. Disputes about the arbitral procedure will be raised in international enforcement proceedings as due process objections.[29] However, none of the anticipated objections appear to justify a blanket prohibition on international class arbitrations.

The second major objection to enforcement—public policy—reflects the tension between how different countries conceptualize individual procedural rights. Unlike common law countries (which often permit representative actions, albeit to varying degrees), civil law jurisdictions tend to limit or prohibit such actions based on two related concerns. First, plaintiffs have the right to choose the time and manner of bringing a cause of action.[30] Second, defendants have the right to mount a full, individualized defense of all legal and factual claims brought against them.[31] Representative actions—either in court or in arbitration—jeopardize both these principles. Under civil law jurisprudence, absent class members are not always considered to be effectively choosing to exercise their right to a cause of action, even if they are given the opportunity to opt out of the proceeding.[32] Similarly, defendants are considered unable to defend themselves adequately against the generalized claims of absent class members.[33]

Class arbitration is currently set up to reflect the common law vision of the benefits of representative proceedings. As class arbitration becomes more international, state courts—particularly those in civil law countries—will have to consider whether and to what extent they should permit foreign conceptions of rights to be enforced in arbitration. As they do so, they should also keep in mind the purpose and requirements of enforcement treaties such as the New York Convention. While it is true that individual states

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(describing international elements of consumer, employment, and e-commerce law).

[29] *See infra* notes 253–305 and accompanying text.

[30] *See infra* notes 93–95 and accompanying text.

[31] *See infra* notes 361–68 and accompanying text.

[32] *See, e.g.*, Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 14 (2002) (discussing Italian courts' close scrutiny of American class action judgments); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 415–17 (2001) (outlining grounds for European resistance to American-style class actions).

[33] Dreyfuss, *supra* note 32, at 26–27.

are entitled to structure their legal systems in any way they wish, even to the extent that they prohibit the use of representative actions in national courts, arbitration is inherently different than litigation, and the duties of a court asked to enforce an international award are fundamentally different than the duties of a court asked to adjudicate the merits of a dispute or even to enforce a judgment from a foreign court.[34] As the law and policy of international arbitration currently stands, it is improper for courts to deny enforcement of international class awards based on a blanket assertion that the special nature of class arbitration violates the public policy of the enforcing state.

All of these concepts are discussed in more detail below, and the Article proceeds as follows. Section 2 discusses the nature of representative actions, identifying the rationales for such actions and describing how different conceptions of rights affect the form, shape, and availability of a nation's representative actions. This discussion identifies potential arguments for and against the enforcement of class arbitral awards based on public policy, since the public policies regarding representative actions in national courts may also be used to oppose or enforce international class awards.

Section 3 discusses how class arbitrations typically proceed. The focus here is on the procedural rules recently published by two arbitration providers, the AAA and JAMS, since those rules will likely form the procedural foundation of class arbitration in the coming years. This section also discusses the extent to which the arbitral rules mirror the class action provisions of the U.S. Federal Rules of Civil Procedure. These similarities are important because the Federal Rules are known to comply with U.S. notions of due process, and due process is a likely area of concern in international enforcement proceedings. Therefore, this section introduces potential arguments for and against the enforcement of international class arbitral awards based on due process.

Section 4 brings class arbitration into the international realm. The section begins with a discussion of class arbitrations in countries other than United States, which gives some guidance on

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[34] *See, e.g.*, Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd., [1992] 2 All E.R. (Comm) 146 (Eng.) (noting that the court was being asked to enforce an award, not the contract); Westacre Inv. Inc. v. Jugoimport-SPDR Holding Co., [1999] 2 Lloyd's Rep. 65 (Eng. Civ. App.) (same); *see also infra* notes 456–67 and accompanying text.

the acceptability of the procedure beyond U.S. borders. The section then describes the standards which must be met to lodge a successful objection to international enforcement of an award based on due process and public policy concerns. Because the New York Convention[35] is the primary means by which international awards are enforced,[36] this Article focuses on the due process and public policy provisions in the New York Convention as illustrative of the type of arguments that will likely arise in an enforcement proceeding. While it is true that some nations do not consider employment or consumer contracts (the most common type of dispute to be subject to class arbitration) to be "commercial," and therefore potentially outside the ambit of the New York Convention,[37] these sorts of due process and public policy arguments are not limited to the New York Convention and can typically be raised under other international enforcement mechanisms and/or national arbitration laws.

Section 5 weighs the competing legal principles and policy concerns to demonstrate that awards resulting from international class arbitrations should be treated no differently than awards resulting from bilateral or multilateral arbitrations. This conclusion can be reached through reliance on (1) the general pro-arbitration policy embodied in the New York Convention[38] and prevalent in many—though not all—national systems[39] as well as on (2) the policy rationales in favor of class treatment as a remedy for widespread injuries, particularly in cases where individual recovery would be minimal.[40] Although international class arbitration challenges pre-existing notions of what constitutes

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[35] New York Convention, *supra* note 1.

[36] One hundred and forty-two states have currently ratified, acceded, or succeeded to the New York Convention. *See* UNCITRAL, Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2008), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[37] *See* New York Convention, *supra* note 1, art. I(3) (noting signatories may declare that the New York Convention will apply "only to differences . . . which are considered as commercial under the national law of the State making such declaration").

[38] Park & Yanos, *supra* note 2, at 254, 259.

[39] *See infra* notes 387–90 and accompanying text.

[40] *See infra* notes 63–64 and accompanying text.

proper arbitral procedure[41] and, in some cases, may require a state to reconsider the nature of individual procedural rights in dispute resolution proceedings,[42] these objections are insufficient to withstand arguments in favor of a rule permitting the enforcement of class arbitration awards on the same basis as other arbitral awards.

Section 6 concludes the Article with a discussion of the future of international class arbitrations as a matter of procedure and enforcement. The section also summarizes the most important issues that courts will have to address when considering whether to enforce an international class award.

2. REPRESENTATIVE AND COLLECTIVE ACTIONS AROUND THE WORLD

Although the United States class action is the perhaps the best known means of providing representative relief to large groups of plaintiffs, most countries have considered their own forms of representative or collective relief.[43] For example, the European Directive on Injunctions for the Protection of Consumers' Interests ("European Directive")[44] required all Member States of the European Union to assign rights of action to "qualified entities," defined either as organizations (including consumer associations) or independent public bodies, that would allow those entities to file a group litigation on behalf of a specifically defined group of people who had been injured by the defendant's conduct. However, these actions are not entirely analogous to U.S.-style class actions, since the European Directive explicitly noted that "collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement."[45]

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[41] LEW ET AL., *supra* note 16, para. 16-1 (noting the presumption is that arbitrations involve only two parties, despite the increasing number of multiparty proceedings).

[42] *See infra* notes 90–121 and accompanying text.

[43] Sherman, *supra* note 27, at 401; *see also* Taruffo, *supra* note 32, at 412–13 (noting European trend not to adopt U.S.-style procedures in representative actions).

[44] Council Directive 98/27, 1998 O.J. (L 166) 51, 53 (EC).

[45] *Id.* at 51.

In fact, the issue of group rights and injuries is becoming increasingly urgent throughout the world.[46] The common objectives of any class or representative action include principled predictability; proportionality of treatment (all class members receive some good, potentially smaller than if they had proceeded individually, in return for increased efficiency); access to justice; judicial economy; and balancing judicial activism and personal autonomy.[47] Though individual compensation may be a goal, participants in group litigation may also seek to bring about social or legal change.[48]

Though most comparative analyses of class, group, representative, or collective actions have been conducted to determine whether certain procedures are appropriate for "transplantation" into another legal system,[49] the following discussion has a slightly different aim: to consider whether and to what extent other legal systems would be amenable to enforcing a foreign arbitral award issued in a class arbitration and/or acting as a seat for class arbitrations. The fact that representative actions are allowed in an increasing number of jurisdictions suggests that class arbitrations may be met with approval in some, if not all, states. Furthermore, the fact that there is a growing acceptance of these types of actions suggests the absence of the type of universal hostility to class arbitration that would permit a blanket objection based on concerns about due process and public policy under the New York Convention.[50]

2.1. Class Actions in United States Federal Courts

Of all the representative actions in the world, the U.S. class action is probably the best known in international legal and business circles. However, even within the United States itself,

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[46] *See* Baumgartner 1, *supra* note 26, at 301–03 (discussing the increasing global interest in group litigation); *see also* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 267 (1992) (noting the increase in the number of group injuries). In the last thirty years, there have been four international conferences dedicated to comparative studies of class actions. Gidi, *supra* note 20, at 324 n.22.

[47] MULHERON, *supra* note 20, at 47–63.

[48] Taruffo, *supra* note 32, at 407–09.

[49] *See* Baumgartner 1, *supra* note 26, at 301–03 (comparing U.S. and Swiss group litigation devices); Gidi, *supra* note 20, at 322 (comparing U.S. and Brazilian class action procedures).

[50] *See infra* notes 370–440 and accompanying text.

class actions are both praised and excoriated.[51] Some consider such actions a lawyer-driven form of "legalized blackmail," while others have characterized them as a "powerful and pervasive instrument[] of social change."[52] Although many individual U.S. states have their own form of class actions, the U.S. Federal Rules of Civil Procedure[53] have acted as the model for both the Supplementary Rules on Class Arbitration adopted by the AAA on October 8, 2003 ("AAA Supplementary Rules")[54] and the Class Action Procedures adopted by JAMS in February 2005 ("JAMS Class Arbitration Rules"),[55] and thus will form the basis of the following discussion.

Although Hans Smit has criticized the decision by the AAA and JAMS to mirror the U.S. Federal Rules as "an uninspired and superficial effort to introduce into arbitration a form of action that, on the whole, has not worked properly in litigation and . . . will exacerbate the problems it has encountered in court litigation,"[56] the choice was likely made because the U.S. Federal Rules are a known and respected commodity that would translate well to a new form of action. As Carole Buckner has said, "[t]he scope of due process in class action litigation defines the possible scope of due process protection that arbitration providers should consider providing in class arbitration."[57]

U.S. class actions can arise in a variety of contexts, though most are damages class actions against corporate defendants, with approximately one-third of these cases arising in the context of the consumer, commercial, or employment fields.[58] Banks, insurance companies, and manufacturers are typical defendants in class actions,[59] and claimants can seek injunctive relief in addition to (or instead of) money damages.[60] Although class actions began as a

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[51] Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOYOLA L.A. L. REV. 719, 719 (2006).

[52] Weston, *supra* note 20, at 1726 (citations omitted).

[53] FED. R. CIV. P. 23.

[54] AAA SUPPLEMENTARY RULES, *supra* note 7.

[55] JAMS CLASS ARBITRATION RULES, *supra* note 7.

[56] Smit, *supra* note 13, at 211.

[57] Carole J. Buckner, *Due Process in Class Arbitration,* 58 FLA. L. REV. 185, 195 (2006) [hereinafter Buckner 2].

[58] Buckner 1, *supra* note 27, at 301.

[59] Sternlight, *supra* note 3, at 5.

[60] Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 172 (2001).

domestic procedural device, they have become increasingly transnational.[61] This Article assumes the reader's general familiarity with class proceedings under the U.S. Federal Rules of Civil Procedure and thus will focus only on those aspects that affect the discussion of international class arbitration.[62]

Judge Jack Weinstein, one of the foremost experts on U.S. class actions,[63] believes class actions include a number of advantages, many of which also apply to class arbitration:

1. They reduce duplication of discovery, motion practice, and pretrial procedures.
2. They allow a single judge to familiarize himself or herself with the legal and factual issues.
3. They provide consistency of results for all the injured and for the defendants.
4. They enhance the possibility of a single action resolving the entire problem, hence preventing the need for repetitive litigation of similar issues. Those who opt out of the class (as is often possible) will generally represent but a small percentage of possible claimants.
5. They permit plaintiffs' attorneys to generate enough capital to conduct the litigation on a playing field level for both sides.
6. They enhance the possibility of a global settlement, which can provide reasonable relief for prospective claimants while limiting the costs for both parties and providing closure to the dispute for defendants.
7. They provide the possibility of a single fair punitive damage amount instead of repetitive and overlapping punishment. . . .

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[61] *See* Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy–Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1567 (2005) (discussing issues involving non-U.S. victims who pursue class actions in U.S. courts); *see also* Weinstein, *supra* note 60, at 167 (describing how the increasingly global economy can lead to an increase in international class actions). The international nature of the U.S. class action suggests how and why class arbitrations might become equally international.

[62] For a detailed summary of class actions in the United States, see OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 395–405 (2007).

[63] *See* Bloom, *supra* note 51, at 735 (discussing Weinstein's impact on class actions in the United States).

8. They give the court power to control legal fees, which may otherwise be much greater than warranted.
9. They allow a single appellate panel to review the case.
10. Perhaps most important, they permit recoveries for small claims by those who may not even know they were injured and almost certainly would not bother to sue even if they had known. By, in theory, requiring a defendant to pay the entire social cost of its delicts they should avoid much of the reason for high punitive damages.[64]

Julian Lew has identified similar benefits to multiparty arbitration (albeit outside the class context), suggesting multiparty arbitration should proceed when to do so would encourage procedural economy; avoid inconsistent awards; increase fairness by facilitating fact-finding and presenting legal and factual arguments; address any confidentiality concerns; and uphold the equal ability to choose arbitrators.[65] Class actions (or arbitrations) also allow defendants to bring complex disputes to a close relatively quickly, thus allowing defendants to "get on with their affairs" and avoid large transactional costs.[66]

However, there are also a number of disadvantages associated with class actions. For example:

1. The judge may lack familiarity with the law if more than one jurisdiction's substantive law must be applied.
2. They increase the complexity of the litigation.
3. They place a significant burden on individual courts, since they are time consuming, containing more factual and legal issues than any individual case.
4. They remove local issues from their normal venue. Forum shopping problems are compounded.
5. They supersede the local jury's role and replace it with a jury that may be unfamiliar with local conditions.
6. They often require the application of many different substantive laws, some of which are still in a state of uncertainty.

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[64] Weinstein, *supra* note 60, at 172–74; *see also* Sternlight, *supra* note 3, at 28 (describing the nature and benefit of class actions); Weston, *supra* note 20, at 1727 (same).

[65] LEW ET AL., *supra* note 16, para. 16–92.

[66] Weinstein, *supra* note 60, at 174–75.

7. They attenuate the usual individual client-attorney relationship, creating new ethical pressures.
8. They are often in significant tension with federalism assumptions. One elected state county judge may bind the nation.
9. They may force defendants to settle because of the threat of huge awards.
10. Finally, there is the fundamental problem that the Supreme Court has been dealing with—protecting the rights of those class members with little knowledge of the suit, virtually no ability to monitor their attorneys, and potential conflicts with other members of the class.[67]

Although most of the advantages of class actions apply equally to class arbitration, the disadvantages of judicial class actions do not track class arbitration quite as closely, due to the privatized nature of arbitration. For example, the courts are not clogged by large cases, since arbitrators work independently, nor are there choice of forum or jury issues, since the parties have chosen arbitration precisely to avoid such concerns.[68] The only real concerns involve ethical issues; pressure to settle; and, most importantly, due process issues. Thus class arbitrations would seem at least as socially beneficial, and possibly more so, than class actions.

However, class actions force judges to play a unique and difficult role. The Federal Judicial Center notes that judges not only must "anticipate[e] the consequences of poorly equipped class representatives or attorneys, inadequate class settlement provisions, and overly generous fee stipulations" but also "cannot rely on adversaries to shape the issues that [the judge] must resolve in the class context."[69] In particular, judges need assistance from their peers "to determine when class representatives and counsel are 'adequate' and whether a settlement's terms are 'fair'

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[67] *Id.* at 173–74; *see also* Smit, *supra* note 13, at 210 (noting criticisms of class actions); Sternlight, *supra* note 3, at 34–37 (same).

[68] *See* LEW ET AL., *supra* note 16, paras. 1-7 to 1-30 (defining the features of arbitration and comparing these to the features of litigation in national courts).

[69] BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 2 (2005). Critics of class actions have also pointed to abuses associated with self-appointed class representatives and class counsel who drive litigation for their own personal gains. Sherman, *supra* note 27, at 409–11.

to the class as a whole, 'reasonable' in relation to the class's legitimate claims, and 'adequate' to redress class members' actual losses."[70] Judges in class actions can also expect to "determine[] when and how to decide class certification motions" and "review[] notice plans and notices to the class to ensure the best notice practicable," both of which are central to due process.[71]

Indeed, the reason why the court plays this unusually active role in administering class actions is "to ensure fairness and to protect the due process rights of those class members not participating in the case. The elaborate procedural steps in such representative litigation—fairness oversight, notice, adequacy of representation, and judicial involvement in class certification—reflect important constitutional due process protections."[72] In this context, due process "protection includes, at a minimum: notice, a meaningful opportunity to participate, and adequate representation. Rule 23 provisions reflect these constitutional requirements, and the court's role is critical in safeguarding the due process rights of absent class members."[73] Of course, notice and the opportunity to participate have also received heightened protection in international arbitration.[74]

As shall be seen below, the same due process concerns also exist in class arbitrations. Indeed, these issues may be particularly problematic in international class arbitrations, since courts asked to enforce an international award may not be as familiar with the types of due process protections that are built into the U.S. system. However, as discussed further below, the New York Convention offers only limited grounds for non-enforcement, and international class awards should pass scrutiny under the international standards for enforcement, despite concerns about due process.[75]

Responsible arbitrators—like responsible judges—want to adopt acknowledged "best practices." However, arbitrators in class arbitrations—including international class arbitrations—may find it difficult to implement some of the Federal Judicial Center's "best practices," since they do not have the same kind of peer

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[70] ROTHSTEIN & WILLGING, *supra* note 69, at 2.

[71] *Id.* at 2–3.

[72] Weston, *supra* note 20, at 1714; *see also* Sternlight, *supra* note 3, at 32–33 (describing due process concerns in class actions).

[73] Weston, *supra* note 20, at 1728.

[74] *See infra* notes 253–305 and accompanying text.

[75] *See infra* notes 253–305 and accompanying text.

network that judges do and may be restricted—due to confidentiality concerns[76]—from discussing the issues with other experienced arbitrators or from using objectors to provide additional information to the court, either through written submissions or through attendance at a class settlement fairness hearing.[77] Furthermore, U.S. courts handling class actions often work in tandem with other government actors, either on the regulatory side or when coordinating class actions that are proceeding in different fora, something which may be difficult in arbitration.[78] Finally, the Federal Judicial Center recognizes that some judges must deal with "'[t]ruly' global settlements [that] will include class members whose language is not English and who may not be citizens of an English-speaking country."[79] In these situations, effective notice—both in judicial class actions and international class arbitrations—becomes even more difficult.[80] The problem is compounded by the fact that notice and adequacy

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[76] LEW ET AL., *supra* note 16, para. 24-99. Interestingly, several commentators have argued that there is, or should be, a public interest exception to arbitral confidentiality. Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corporation v. United States, 21 ARB. INT'L 211, 211–212 (2005) [hereinafter Mistelis 1]; Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 ARB. INT'L 59, 59–60 (2005). Certainly confidentiality is not the absolute barrier that it once was thought to be. *See* L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131, 131, 139 (1999) (describing instances wherein principle of confidentiality may be breached); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006) [hereinafter Reuben 1] (noting state and federal law fails to respect confidentiality in arbitration, at least in instances involving discovery or admissibility of evidence at trial).

[77] *Compare* ROTHSTEIN & WILLGING, *supra* note 69, at 11, 21 *with* LEW ET AL., *supra* note 16, paras. 16-75, 24-99; *see also* FIONA MARSHALL & HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., GOOD GOVERNANCE AND THE RULE OF LAW: EXPRESS RULES FOR INVESTOR-STATE ARBITRATIONS REQUIRED 11 (2006), http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf (describing *amicus* filings in investor arbitrations); Mistelis 1, *supra* note 76, at 218, 221–22 (noting the practice of amicus filings has no counterpart in commercial arbitration); Sternlight, *supra* note 3, at 53 (discussing objectors in class arbitrations).

[78] *See* ROTHSTEIN & WILLGING, *supra* note 69, at 25–28 (describing the role of government actors in U.S. class action litigations).

[79] *Id.* at 19; *see also* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 65–69 (2003) (highlighting problems relating to notices provided in English to non-English speakers). However, arbitrators do not have to comply with the technical rules of civil procedure, including those concerning notice, which can make class arbitration easier in ways than class actions. Buschkin, *supra* note 61, at 1582.

[80] ROTHSTEIN & WILLGING, *supra* note 69, at 19.

of representation typically serve as proxy for due process, allowing the court to bind absent class members in a court-administered class action.[81]

As it turns out, arbitrators dealing with class proceedings may stand in a better position than arbitrators handling bilateral proceedings. As will be discussed further below, class arbitrations proceeding under the auspices of the AAA are listed on a publicly available website. "[A]lthough arbitrators generally do not create precedent and are not bound by other arbitrators' decisions, evidence from the AAA class arbitrations suggests that they may be strongly influenced by other arbitration awards in similar cases," thus creating "something akin to informal precedent," particularly in the area of class certification.[82] Similarly, "collective arbitral wisdom" can arise in certain circumstances.[83] In many ways, this standardization can be very useful to parties and arbitrators in a newly filed international class arbitration. Increased confidence about the competence of the arbitrator and the procedure is yet another factor in favor of giving international class awards the same presumptions in favor of enforcement as are given to bilateral awards.

Throughout a class action, the judge plays a uniquely active role in overseeing the proceedings.[84] The precise tasks that a judge may take on can vary widely, depending on the temperament of the judge, the type of case, and the approach taken by counsel. For example, the court might "tak[e] initiative in shaping the suit, establish[] strict timelines for litigation, work[] with magistrates, devis[e] expert panels to facilitate discovery, direct[] pretrial scheduling, and engage[e] in fact-finding, while promoting settlement throughout the process."[85] The justification for such intensive court control and participation is, again, the protection of absent class members.[86] The court's oversight capacity includes

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[81] Weston, *supra* note 20, at 1722.

[82] Weidemaier, *supra* note 8, at 71, 103–04.

[83] Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (2000) [hereinafter Reuben 2].

[84] *See* Buckner 2, *supra* note 57, at 201–02 (describing judge's role in class actions, as compared to judge's role in non-class litigation); Weston, *supra* note 20, at 1731 (same).

[85] Weston, *supra* note 20, at 1731.

[86] *See* FED. R. CIV. P. 23(d)(1)(B) (emphasizing protection of absent class members as an appropriate judicial concern); *accord* Weston, *supra* note 20, at 1731

not only the adversarial process, but the settlement process as well, since Rule 23 requires courts not only to approve any settlement between the parties, but also to hold a fairness hearing to ascertain whether the settlement is "'fair' to the class as a whole, 'reasonable' in relation to the class's legitimate claims, and 'adequate' to redress class members' actual losses."[87] Although this sort of activist approach may appear improper to civil law lawyers,[88] international commercial arbitration contemplates the possibility of more active adjudication than occurs in litigation, so the need for a hands-on arbitrator in a class proceeding is not problematic as a matter of practice and theory.[89]

2.2. Representative Actions Around the World

A growing number of jurisdictions have implemented their own versions of collective and representative actions.[90] However, these other models do not necessarily resemble that found in the U.S. In fact, many states—particularly civil law systems—have deep-seated concerns about the U.S. model due to fundamental conceptual differences about how individual procedural rights operate.[91] Indeed, some commentators have claimed that if "major

(describing the role of Rule 23 of the Federal Rules of Civil Procedure in directing court activity).

[87] ROTHSTEIN & WILLGING, *supra* note 69, at 2.

[88] *See* Baumgartner 1, *supra* note 26, at 310–11 (asserting that U.S.-style class actions are inconsistent with Swiss norms and jurisprudential traditions); Cappalli & Consolo, *supra* note 46, at 290–91 (describing European distrust of American judicial practices in class action proceedings); Gidi, *supra* note 20, at 371 (discussing Brazilian view of U.S.-style representative actions).

[89] *See* Rau & Sherman, *supra* note 13, at 91–92, 97 (stating that international arbitrators play a more active role in directing the proceedings than common law judges).

[90] *See generally* CHASE ET AL., *supra* note 62, at 390–434 (describing collective and representative actions around the world); Baumgartner 1, *supra* note 26, at 308–09 (discussing class or representative proceedings in a variety of common law systems); Gidi, *supra* note 20, at 312–13 (noting that although class or representative proceedings are generally disfavored in civil law nations, both Quebec and Brazil have adopted types of class action litigation).

[91] *See* Baumgartner 1, *supra* note 26, at 320–21 (basing the Swiss emphasis on individual causes of action on nineteenth century German Pandectism and Kantian concepts of free will); Cappalli & Consolo, *supra* note 46, at 264 (noting U.S. class actions are legally "inconceivable" in the civilian mindset); Gidi, *supra* note 20, at 344–45 (discussing the concept of "subjective right" that is prevalent in the civil law and identifying Hans Kelsen as one of the few writers in English who has discussed "subjective rights").

legal innovation" is to occur in the area of representative actions, "civil law jurists must first arrive at a consensus to change the 'science'" upon which the civil law is built.[92]

Although a detailed jurisprudential discussion is outside the scope of this Article, the differences in mindset are pronounced. First and foremost, civil law jurisdictions traditionally emphasize the individual nature of legal claims, a notion that would be violated by a representative mechanism that disposes of the rights of absent class members.[93] This is because civil law nations interpret a class action—even with an opt-out provision—as an infringement of a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action.[94] Because the right to an individual cause of action is inviolate and cannot be overcome by arguments of social or judicial efficiency,[95] civil law nations resist a wide rule allowing representative actions.

Furthermore, those civil law systems that have instituted group or collective actions have typically not done so by creating general procedural devices to be used in a wide variety of circumstances; instead, the new actions are usually subject-matter specific and address particularly egregious commercial practices.[96] For example, in 1988 the European Union addressed consumer protection issues through the European Directive, leading to legislative reforms at the individual Member State level, following a similar European-wide action in 1985 concerning product liability.[97] Individual nations have also taken action, with

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[92] Gidi, *supra* note 20, at 346.

[93] *See* Baumgartner 1, *supra* note 26, at 310–11 (noting that the Swiss emphasis on the individual's right to be heard "would need to be slighted in complex cases"); Cappalli & Consolo, *supra* note 46, at 233 (stating that civil law nations disfavor the American class action approach because they consider litigation a "matter for individual enterprise"); Gidi, *supra* note 20, at 385–86 (noting how the concept of *res judicata* in civil law systems creates problems for advocates of representative proceedings); Taruffo, *supra* note 32, at 416 (discussing the scope of *res judicata* in civil law systems).

[94] Gidi, *supra* note 20, at 344–45.

[95] *See* Weinstein, *supra* note 60, at 172–74 (listing advantages of class actions).

[96] *See* Taruffo, *supra* note 32, at 411; *accord* Gidi, *supra* note 20, at 313 n.2, 348 (noting specific instances in which civil law nations have created limited recourse to representative actions through narrowly drafted legislation).

[97] Council Directive 98/27, 1998 O.J. (L 166) 51 (EC); Council Directive 85/374, 1985 O.J. (L 210) 29 (EC); CHASE ET AL., *supra* note 62, at 406. For an analysis of consumer arbitration in Europe, see Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*,

Germany passing domestic legislation in 2005 concerning injuries suffered by investors or shareholders in situations involving takeover offers.[98] This approach not only maintains respect for individual procedural rights, it also reflects the civil law's preference for having the legislature, rather than the judiciary, constitute the means of addressing mass injuries.[99]

In addition to the jurisprudential concerns, there are pragmatic issues. Lawyers in civil law countries are suspicious of any procedure that requires a great deal of judicial intervention, since judges typically do not wield that kind of power in civil law systems.[100] Furthermore, many civil law lawyers are suspicious of American-style class actions because they believe (mistakenly) that certain litigation practices that they see as highly problematic—including contingency fees, punitive damages, and massive discovery—are a necessary part of the class action mechanism.[101]

Thus it is not surprising that representative actions are found primarily in common law jurisdictions, with countries such as Canada (including Quebec, the country's only civil law province)[102]

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28 N.C. J. INT'L L. & COM. REG. 357, 379–83 (2002) (comparing variations in dispute resolution clauses based on jurisdiction).

98 CHASE ET AL., *supra* note 62, at 413. Other European states have addressed environmental protection, labor law, sex and race discrimination, abusive measures in contracts of adhesion, and other commercial practices considered to be harmful to certain segments of society. Gidi, *supra* note 20, at 313 n.2.

99 Baumgartner 1, *supra* note 26, at 310–11; Gidi, *supra* note 20, at 371.

100 *See* Baumgartner 1, *supra* note 26, at 311 (describing civil law concerns about class actions); Cappalli & Consolo, *supra* note 46, at 290–91 (noting the passivity of the civil law judge); Gidi, *supra* note 20, at 319 (noting "[a] common misconception" about civil law judges is that they exercise "great power over the conduct of the proceedings;" in fact, civil law judges' discretion is primarily limited to the receipt of evidence). However, international commercial arbitration permits a great deal of procedural flexibility, so an activist arbitrator in a class arbitration might be acceptable to a civil law lawyer. *See* Rau & Sherman, *supra* note 13, at 91–92, 97 (describing the more active role adopted by arbitrators).

101 *See, e.g.*, Baumgartner 1, *supra* note 26, at 311 (discussing presumptions made regarding U.S.-style class actions); Gidi, *supra* note 20, at 322, 324 n.22, 371 (discussing the evolution of the "traditional myth" regarding U.S. class actions amongst civil law scholars).

102 Class Proceedings Act, 1992 S.O., ch. 6 (Ontario, Can.); Class Proceedings Act, 1996 R.S.B.C., ch. 50 (British Columbia, Can.); The Class Actions Act, 2001 S.S., ch. C-12.01 (Saskatchewa, Can.); Manitoba Class Proceedings Act, 2002 S.M., ch. C140 (Can.); Class Actions Act, 2001 S. Nfld., ch. C-18.1 (Newfoundland and Labrador, Can.); Alberta Class Proceedings Act, 2003 S.A., ch. C-16.5 (Can.); Code of Civil Procedure, R.S.Q., ch. C-25, at arts. 999–1051 (Quebec, Can.); *Western Canadian Shopping Centres Inc. v. Dutton* [2001] 201 D.L.R. 385, 534 (Can.); *see* Law Society Amendment Act (Class Proceedings Funding), 1992 S.O., 1002 ch. 7

and Australia[103] recognizing a broad form of such actions, similar to that found in the United States. This suggests that Canadian and Australian courts will not experience any conceptual difficulties in enforcing an award issued by a class arbitration seated in the United States. The similarities between Canadian, Australian, and American class proceedings also suggest that Canadian and Australian courts would be amenable to having a class arbitration seated within their jurisdiction.[104]

England, another common law jurisdiction, permits representative relief, but on a limited basis and to a much lesser degree than Canada or Australia.[105] Nevertheless, England adopted new provisions for group litigation in May 2000 to provide "case management of claims which give rise to common or

(providing funding for class proceedings); s*ee also* CHASE ET AL., *supra* note 62, 390–434 (describing collective or representative actions around the world); MULHERON, *supra* note 20, at 8 (discussing the enactment of Ontario's Class Proceedings Act of 1992); S. Gordon McKee & Martha Cook, *Class Actions in Canada: 2005 State of the Union*, 73 DEF. COUNS. J. 31, 31, 42 (2006) (detailing recent developments in class actions in Canada); Sherman, *supra* note 27, at 429 (noting the growing number of jurisdictions that are adopting class proceedings); Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 MICH. ST. L. REV. 755, 775–76, 796 (evaluating the willingness of Canadian courts "to recognize the certification of a class action"). Unlike some other countries that oppose the idea of a "private attorney general," Canadian class proceedings "follow the American model by relying upon 'lawyer-entrepreneurs to initiate and drive class actions, [and] allowing lawyers to risk non-payment for losing cases in the hopes of recovering substantial court-awarded contingency fees when the cases are successful.'" Sherman, *supra* note 27, at 430 (quoting Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 273 (2001)).

[103] Federal Court of Australia Act, 1976, c. 33 (Austl.); MULHERON, *supra* note 20, at 6–8; Sherman, s*upra* note 27, at 424–29. Class actions in Australia may be brought for any type of claim and regardless of the type of remedy sought. Sherman, *supra* note 27, at 426.

[104] Indeed, Canada appears to have already had some experience with domestic class arbitrations. *See infra* notes 235–47 and accompanying text. However, because the judicial discovery process in Canada is much less onerous than it is in the United States, there may be less incentive to have class procedures in arbitration rather than the courts. Furthermore, recent legislation in certain Canadian provinces limiting the enforceability of arbitration clauses in consumer contracts may further reduce the likelihood of class arbitration in those regions.

[105] *See* ENG. CIV. PRO. R. 19.6 (providing that the parties in a representative action must have the same interest in a claim); MULHERON, *supra* note 20, at 67–68 (citing Markt & Co. Ltd. v. Knight Steamship Co. Ltd., [1910] 2 K.B. 1021 (CA)); Dixon, *supra* note 14, at 143, 146–47 (further discussing the "same interest" requirement); *see generally* J.J. Fawcett, *Multi-Party Litigation in Private International Law*, 44 INT'L & COMP. L.Q. 744 *passim* (1995) (examining multi-party litigation under English law).

related issues of fact or law."[106] The new form of action was created in response to the European Directive,[107] which required all Member States of the European Union to assign rights of action to "qualified entities," defined either as organizations, including consumer associations, or independent public bodies, allowing those entities to file a group litigation on behalf of a specifically defined group of people who had been injured by the defendant's conduct.[108] However, these actions do not take the same form as class actions in the United States, since the European Directive explicitly noted that "collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement."[109] The English group action thus reflects the civil law view that individuals may not act as private attorneys general, as is permitted and encouraged in the United States.[110] The English group action also suggests that future developments in English group and collective actions will follow the European model, addressing specific legal subjects (as the European Directive did) rather than undertaking wholesale procedural reforms that can be used in a variety of areas of law.[111]

Although England has not adopted a broad form of representative class action for its own use, it has considered the enforcement of U.S. class action judgments and found that they do

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106 ENG. CIV. PRO. R. 19.10; *see also* Rachael Mulheron, *From Representative Rule to Class Action: Steps Rather Than Leaps*, 24 CIV. JUST. Q. 424, 448–49 (2005) (noting that English courts have sought to interpret the representative rule as requiring commonality, rather than identicality, of interest); Rachael Mulheron, *Some Difficulties With Group Litigation Orders—And Why a Class Action is Superior*, 24 CIV. JUST. Q. 40, 47–49 (2005) (examining difficulties with the new group litigation provisions).

107 Council Directive 98/27, 1998 O.J. (L 166) 51 (EC); Louis Degos & Geoffrey V. Morson, *Class System: The Reforms of Class Action Laws in Europe are as Varied as the Nations Themselves*, 29 L.A. LAW. 32, 34 (2006).

108 Council Directive 98/27, 1998 O.J. (L 166) 51 (EC); *see also* Sherman, *supra* note 27, at 418–19 (discussing the European Directive); Elena Torres, *In Unity, Is There Strength? Representative Claims – Overview of Some European Developments*, 12 INT'L CO. & COM. L. REV. 178 (2001).

109 Council Directive 98/27, 1998 O.J. (L 166) 51 (EC).

110 Sherman, *supra* note 27, at 418.

111 *See* Degos & Morson, *supra* note 107, at 38–39 (noting that the European model of class proceedings focuses on specific areas of law and assigns rights to associations rather than individuals); Sternlight & Jensen, *supra* note 13, at 98 (suggesting that, unlike the United States, European countries with large-scale bureaucracies charged with protecting consumer rights do not need to rely on class action).

not violate the principles of "natural justice," which are similar to U.S. notions of due process.[112] So long as notice, along with the opportunity to opt out or object to the class proceeding or settlement, is given to class members, the requirements of natural justice have been met.[113] This bodes well for actions to enforce foreign class arbitral awards in England, since it suggests that—so long as due process exists—there is no per se policy rule against class proceedings.[114] Furthermore, it also suggests that England might not be adverse to acting as the seat of a class arbitration, so long as the proper safeguards concerning natural justice and due process are in place.[115]

Unlike common law jurisdictions, civil law jurisdictions typically exhibit vigorous objections to representative actions on both pragmatic and philosophic grounds, and resist attempts to transplant what is seen as a U.S. or common law mechanism into a civil law system.[116] Few civil law nations permit representative relief, although Brazil[117] and Colombia[118] have apparently taken strides in that direction. Switzerland, an important jurisdiction due

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[112] *See* Campos v. Kentucky & Ind. Terminal R.R. Co. [1962] 2 Lloyd's Rep. 459, 473 (noting, *obiter*, that a foreign class action judgment could give rise to a plea of res judicata in English courts if "the party alleged to be bound had been served with the process which led to the foreign judgment"); Dixon, *supra* note 14, at 136, 140 (arguing that a U.S. class action decision would not violate English principles of natural justice).

[113] Dixon, *supra* note 14, at 148 (citing *Jacobson v. Frachon* [1927] 138 L.T. 386, 390, 392 (CA)). This standard was adopted in *Adams v. Cape Industries Plc.*, even though the procedures there did not rise to the necessary level. [1990] 2 A.C. 433, 556–67 (noting lack of objective assessment of individual damages violated principles of justice); *see also* Dixon, *supra* note 14, at 150 (arguing that the decision in *Cape Industries* does not suggest that a U.S. class action would violate natural justice).

[114] Dixon, *supra* note 14, at 150–51.

[115] England's pro-arbitration policy would also suggest a pro-class arbitration stance. *See* Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 480 (2007) (discussing factors demonstrating England's pro-arbitration stance).

[116] *See supra* notes 90–101 and accompanying text. However, the passage of the European Directive has led to some forms of collective actions in continental Europe. CHASE ET AL., *supra* note 62, at 395–405.

[117] Gidi, *supra* note 20, at 312–13 (discussing the Public Civil Action Act (1985) and Consumer Code).

[118] *See* Valencia v. Bancolombia (Colom. v. Colom.), *digest by* Zuleta DIGEST for Institute for Transnational Arbitration (ITA) (Arb. Trib. from the Bogotá Chamber of Comm., 2003), *available at* http://www.kluwerarbitration.com. (referencing legislation regarding class actions in Colombia).

to its standing in the international arbitral community,[119] permits an association action (similar to that mandated by the European Directive) at civil law, though the right to relief is expanded somewhat for administrative law matters, allowing some individuals to initiate a representative proceeding.[120] However, Switzerland's strongly pro-arbitration stance suggests that Switzerland would both enforce a class award and act as a seat of class arbitration, even though representative actions are not common or widely available in Swiss courts.[121]

2.3. How the Availability of Representative Actions Affects International Class Arbitration

Although international class arbitration is a new and developing dispute resolution mechanism, class or representative actions have been in existence for much longer, as the preceding discussion has demonstrated. They are most developed and most prevalent in the United States, both in their arbitral and judicial forms.[122] However, the fact that an increasing number of jurisdictions are embracing representative actions suggests that some of the hostility to representative actions is waning.

As will be discussed in more detail below, the growing international acceptance of representative actions is important because it offsets any arguments that international class arbitration is presumptively improper as an unusual and jurisprudentially unsound mechanism that should not be given the benefit of the pre-enforcement policies inherent in the New York Convention. Any objections that can be raised to the nature of representative actions—be they judicial or arbitral—exist only at the domestic level, not the international level. There is no international

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[119] Paulsson, *supra* note 115, at 477 n.2.

[120] Baumgartner 1, *supra* note 26, at 332 (discussing the civil law *Verbandsklage* and the administrative law *Verbandsbeschewerde*). Shareholder litigation is another area of group litigation in Switzerland. *Id.* at 334.

[121] Paulsson, *supra* note 115, at 496.

[122] *See* Samuel P. Baumgartner, *Debates Over Group Litigation in Comparative Perspective*, 2 INT'L L. F. DU DROIT INTERNATIONALE 254, 255 (2000) [hereinafter Baumgartner 2] (noting that "the United States has had the most extensive experience with class actions"); Sherman, *supra* note 27, at 401–03 (discussing the prevalence of class actions in the United States as compared to other countries); *see also* American Arbitration Association Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited Oct. 17, 2008) (exemplifying the large number of American class arbitration cases).

consensus that representative actions violate agreed notions of due process or public policy; instead, the trend seems to be going in the opposite direction, with states agreeing that representative actions are proper, if not on a wholesale basis, then at least in certain fields such as consumer protection, shareholder actions, and other economically-oriented areas of law.

Although arbitration—as a more informal dispute resolution mechanism—is not meant to mimic litigation, certain lessons can be drawn from shifts in litigation policy. First, whenever litigation—particularly on the global scale, as is the case with representative actions—becomes more informal and relaxed, arbitration can and should follow the lead of the courts. It is inappropriate for states to take a more rigid view of the processes that are permitted in arbitration than they do of the processes that are permitted in litigation. Certainly, parties may always choose to adopt stricter rules of procedure than are required in courts (so long as due process, such as the ability to present one's case, remains intact), but states—particularly signatories to the New York Convention—ought not increase obstacles to arbitration when litigation is becoming more inclusive.[123] Thus, the established acceptance of representative actions in some states and the increasing acceptance of such actions in other states suggest that international class arbitration should be accepted as well.

Second, to the extent that there exists a split in the level of acceptance of representative actions in national courts, that split of opinion demonstrates a lack of international consensus regarding the legitimacy of representative actions. As it stands, the jurisprudence on the New York Convention indicates that objections to enforcement based on due process and/or public policy must view such objections from an international, rather than purely domestic, perspective.[124] Therefore, states may not allow purely domestic concerns to prohibit enforcement of international class awards.

Finally, even those states that remain adamantly opposed to representative actions ought not take a restrictive stance towards the enforcement of class awards. Arbitration is expected and allowed to adopt procedures that would not be permitted in national courtrooms, and the enforcement of an international

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[123] *See infra* notes 374–434 and accompanying text.

[124] *See infra* notes 374–434 and accompanying text.

arbitral award does not require national courts to indicate their approval of a particular dispute resolution mechanism.[125] Instead, a court may protect the integrity of its national legal system and national policies by recognizing that representative actions may be allowed in arbitration but not in litigation.[126]

3. CLASS ARBITRATIONS

3.1. Roots of Class Arbitration

Class arbitration has existed in the United States for over twenty-five years[127] and has been seen in other countries as well.[128] Those jurisdictions that permit class arbitration have determined that its procedures meet established due process standards. However, each state's analysis has, thus far, been limited to domestic criteria, with each jurisdiction considering how well the process aligns with national due process standards. This result makes sense when one considers that most domestic class arbitrations will likely reflect the values and procedures of domestic class (or representative) actions. However, as class arbitration moves onto the international playing field, it is necessary to consider the extent to which the process lives up to internationally recognized standards of due process.

As discussed further below, class arbitrations – even those that closely track certain national litigation procedures – appear to comply with international due process norms.[129] So long as

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[125] *See infra* notes 461–62 and accompanying text.

[126] *See infra* notes 461–62 and accompanying text.

[127] *See, e.g.*, Keating v. Superior Ct., 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) (constituting one of the first class arbitration cases in the United States); Sternlight, *supra* note 3, at 38–39 (noting that the *Keating* court was the first to consider the desirability and feasibility of class arbitration).

[128] Kanitz v. Rogers Cable Inc. (Can. v. Can.), [2002] 58 O.R. 3d 299, 21 B.L.R. (3d) 104, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www.kluwerarbitration.com; *see also* Dell Computer Corp. v. Union des consommateurs (not indicated v. Can.), [2005] Q.C.C.A. 570, *rev'd*, [2007] 2 S.C.R. 801, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www.kluwerarbitration.com; Valencia v. Bancolombia (Colom. v. Colom.), *digest by* Zuleta DIGEST for Institute for Transnational Arbitration (ITA) (Arb. Trib. from the Bogotá Chamber of Comm. 2003), *available at* http://www.kluwerarbitration.com. It is possible that there are other domestic class arbitrations that are not reflected in the international arbitral reporting series.

[129] *See infra* notes 253–305 and accompanying text.

international standards are met, international class arbitrations are eligible for the pro-enforcement presumptions contained within the New York Convention. However, critics of arbitration claim it is "an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."[130] Any determinations made in an arbitration are "not intended to serve the public interest, but only that of the parties who have paid for the arbitration,"[131] which could arguably conflict with the espoused public interest aspects of judicial class actions.[132]

Although many of the issues concerning international arbitration have been refined over the years, international class arbitration creates a whole new set of concerns.[133] For example, some opponents point to the view of arbitration as a contractual construct and argue that if the parties to the arbitration do not explicitly agree to class disposition, then it is improper to proceed as such.[134] The argument, which is outside the scope of this Article, is similar to that made in cases involving consolidation of arbitration as well as cases involving third party intervention and joinder in arbitration.[135]

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[130] Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986); *see* Weston, *supra* note 20, at 1715 (quoting *Stroh Container Co.*); Weidemaier, *supra* note 8, at 71–81 (discussing various criticisms of arbitration); s*ee also* Buckner 1, *supra* note 27, at 306–08 (discussing historical hostility toward arbitration); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996) (noting the historical "stigma of illegitimacy" that attached to arbitral awards due to perceived deviations from legal norms). Many U.S. critics of arbitration focus on employment and consumer arbitration, although there are those who mount rigorous defenses of those particular types of arbitration, even in the realm of class arbitration. *Compare* Sternlight & Jensen, *supra* note 13, at 75–76, 92 (discussing use of arbitration to avoid consumer class actions) *with* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements–With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 274–76 (2006) (discussing prohibitions on class treatment in both litigation and arbitration).

[131] Carbonneau, *supra* note 130, at 1958.

[132] Weinstein, *supra* note 60, at 172–74.

[133] Sternlight, *supra* note 3, at 45–53.

[134] *See, e.g.*, W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 8 (1995) (stating "[d]esigned as a system of private justice, arbitration is a creation of contract"); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987) (noting "[a]rbitration is . . . a creature of contract").

[135] *See, e.g.*, REDFERN & HUNTER, *supra* note 1, paras. 3–82 to 3–85; LEW ET AL., *supra* note 16, paras. 16–39 to 16–40 (noting that involuntary consolidation is considered contrary to arbitral notions of party autonomy); S.I. Strong,

Furthermore, arguments have been made that class arbitrations in the United States improperly infringe upon the due process rights of unnamed, non-participating class members.[136] However, the issue is exacerbated in domestic arbitrations because arbitrators are not considered "state actors," which means that parties in arbitration are not entitled to the full panoply of constitutional due process protections.[137] By agreeing to participate in an arbitration, parties waive some of their due process rights.[138] This is true not only in the United States but in other countries as well.[139] However, this does not appear to be a universal rule: for example, the Spanish Constitutional Court has held that certain fundamental rights—particularly the procedural right of defense—that are guaranteed by the Spanish Constitution are inviolate, even in arbitration.[140] Although the question of the extent to which due

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Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure? 31 VAND. J. TRANSNAT'L L. 915 (1998) (exploring whether the "intervention or joinder of third parties as of right in an arbitral proceeding is wise, necessary, and legally possible").

136 Weston, *supra* note 20, at 1719–20.

137 Buckner 2, *supra* note 57, at 203–14, 231–39, 250; Reuben 2, *supra* note 83, at 990–1017; Weston, *supra* note 20, at 1722, 1745–67.

138 Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972); *see also* Buckner 2, *supra* note 57, at 214–15 & n.207 (citing numerous federal court decisions); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 170 (2004) (discussing various waivers of procedural due process rights); Weston, *supra* note 20, at 1742 ("Constitutional guarantees apply to litigants in state and federal courts and in situations where 'state action' is involved, but not to the activities of private actors."). *But see* Reuben 2, *supra* note 83, at 1019–53 (discussing waivers to due process rights under the Federal Arbitration Act and state arbitration statutes); Weston, *supra* note 20, at 1722–23 ("Presumably, an agreement to arbitrate is not necessarily consent to forgo due process rights—'it merely provides an alternative forum for the adjudication of such rights.'").

139 *See* Aleksandar Jaksic, *Procedural Guarantees of Human Rights in Arbitration Proceedings – A Still Unsettled Problem?* 24 J. INT'L ARB. 159, 165 (2003) (arguing that claimants are unaware that bringing their claims in certain fora can mean the waiver of certain due process rights); Judith O'Hare, *The Denial of Due Process and the Enforceability of CIETAC Awards Under the New York Convention: the Hong Kong Experience*, 13 J. INT'L ARB. 179, 185 (1996) (discussing the waiver of due process rights in Hong Kong); Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View*, 21 J. INT'L ARB. 413, 416–19, 426–47 (2004) (stating that parties consenting to arbitration waive their rights under Article 6(1) of the European Convention); Tweeddale, *supra* note 76, at 67–68 (discussing how the European Court of Human Rights has stated that the right to a public hearing before a country's national courts is subject to implied limitations).

140 Cairns, *supra* note 15, at 593.

process rights can be waived is an issue in international arbitration, the "state actor" problem does not arise in international disputes, because article V(1)(b) of the New York Convention explicitly protects certain key rights by allowing objections to enforcement based on violations of due process.[141] The question, therefore, is how the special due process concerns associated with class arbitration measure up to the due process requirements protected under the New York Convention.[142] Due process-based objections to international class arbitrations will likely focus on the procedures adopted by the arbitrator.[143]

3.2. Procedures in Class Arbitration

3.2.1. Introduction

Because of the large number of reported class arbitrations in the United States and the anticipated extent of U.S. influence on the development of international class arbitration,[144] it makes sense to begin an analysis of the procedures used in class arbitration by looking at the U.S. model. As it currently stands, "[n]o statute, state or federal, prescribes the rules or procedures for class arbitrations to ensure that the process is uniform, fair, or efficient. Moreover, whether any level of court involvement is required—or even permissible—is an open question."[145] The U.S. Supreme Court recently ruled that the arbitrator will determine whether class arbitration is appropriate, as well as the proper procedure for a class arbitration, suggesting that U.S. courts either will not, need not, or should not participate in the class arbitration proceedings,

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[141] *See, e.g.*, New York Convention, *supra* note 1, art. V(1)(b) (describing permissible objections to the enforcement of foreign arbitral awards).

[142] Weston, *supra* note 20, at 1723.

[143] *Id.* at 1719–20. Procedures for class arbitration are still developing, even in the United States, for although the U.S. Supreme Court legitimized class arbitration as a dispute resolution procedure in *Green Tree Financial Corp. v. Bazzle*, the decision provided little guidance beyond the central holding that the arbitrator is to decide whether the arbitration agreement permits class arbitration. 539 U.S. 444 (2003) (plurality opinion); *see also* Smit, *supra* note 13, at 201 (discussing *Bazzle*). In particular, *Bazzle* gave no guidance as to the form of the class arbitration process itself and what roles the court and the arbitrators would play respectively. Weston, *supra* note 20, at 1718, 1721, 1733–34.

[144] *See infra* note 225 and accompanying text.

[145] Weston, *supra* note 20, at 1723.

absent an invitation by the arbitrator.[146] Furthermore, international arbitrators have long held the power (and indeed, the duty) to establish the necessary procedures and determine any procedural issues.[147] Typically, arbitrators respect party autonomy to the greatest degree possible, not only because arbitration is considered a contractual construct but also because enforcement of an international arbitral award may be denied if the procedure was not in accordance with the agreement of the parties.[148]

When considering due process in class arbitration, two areas of inquiry arise: the extent to which the courts will be involved in (1) the substance and (2) the shape of the process. Non-class arbitration considers the second question to some extent, since certain due process standards must be met even if the entire panoply of constitutional protections do not apply in bilateral arbitration. However, the first question—which relates to the possibility that a court may need to adopt a special role *during* the substantive proceedings[149] (to protect the rights of absent class members in class arbitrations)—is unique to class arbitrations. It is particularly problematic in international class arbitrations, since the international arbitral community takes the view that judicial interference in the arbitral process is both unnecessary and improper, and thus to be eliminated or at least minimized.[150]

In the twenty years of class arbitration prior to the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,[151] at least two different models arose regarding the court's role in a class arbitration. First, some state courts—primarily California, Pennsylvania and, in at least one instance, South Carolina—promoted a hybrid method, wherein the court retained

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[146] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453–54 (2003) (plurality opinion). The invitation would come in the form of an appealable partial final award. *See infra* notes 181-92 and accompanying text.

[147] LEW ET AL., *supra* note 16, para. 21–3 (noting the scope of arbitrator discretion concerning procedure).

[148] *Id.* para. 21–5 (noting that procedure is based on party agreement).

[149] This is different than the rule that applies to the period before or after the merits of the dispute are addressed. Courts are frequently involved in motions to compel arbitration prior to the time the merits are heard and motions to set aside or enforce awards after the merits are heard.

[150] National courts may be involved in the initiation of an arbitration and the enforcement of an arbitral award, but they typically avoid entanglements during the substantive proceedings. REDFERN & HUNTER, *supra* note 1, para. 5–47.

[151] 539 U.S. 444 (2003) (plurality opinion).

responsibility for certification, notice and fairness approvals of the final arbitral award, while the arbitrator retained responsibility for evaluating the merits of the case.[152] As Carole Buckner has noted, in this model, "courts remain[ed] involved in the class action-related aspects of the arbitration, to assure that due process protection of absent class members [was] provided."[153] However, there is some question about the continued legitimacy of this approach post-*Bazzle*, since courts in the hybrid model retained the discretion to determine whether a particular dispute was appropriate for class arbitration and *Bazzle* indicated that those questions were properly for the arbitrator.[154] Nevertheless, some courts—particularly those in California—continue to intervene in class arbitrations, albeit in the context of addressing claims of unconscionability and waiver of certain forms of dispute resolution.[155] Courts adopting the hybrid approach seem to take the view that class arbitration is qualitatively different than bilateral arbitration, at least with respect to due process, and that arbitrators are "ill-equipped to assure due process."[156]

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[152] *See* Blue Cross of Cal. v. Superior Court, 78 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1998) (articulating the hybrid method used in California courts); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 876 (Pa. Super. Ct. 1991) (describing the hybrid method used in Pennsylvania courts); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360–61 (S.C. 2002) (promoting the use of a hybrid method in South Carolina courts), *vacated*, 539 U.S. 444 (2003) (plurality opinion); *see also* Buckner 1, *supra* note 27, at 320–23 (further discussing the hybrid models used in various state courts).

[153] Buckner 2, *supra* note 57, at 226.

[154] *Id.* at 227.

[155] Discover Bank v. Superior Court, 113 P.3d 1100, 1106, 1115–16 (Cal. 2005) (citing, with approval, the hybrid approach advocated by *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982) and noting the court's ability to decide issues of unconscionability and waiver even post-*Bazzle*); *see also* Gipson v. Cross Country Bank, 354 F. Supp. 2d 1278, 1286 (M.D. Ala. 2005) (noting that courts can decide whether class action waiver clauses are enforceable); Gentry v. Superior Court, 37 Cal. Rptr. 3d 790, 792 (Cal. Ct. App. 2006) (holding that courts can still consider whether an arbitration waiver is unconscionable). Post-*Bazzle* cases that give questions of class treatment to the arbitrator include *Pedcor Mgmt. Co., Inc. v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 359–60 (5th Cir. 2003) (holding that "it should not be necessary for a court to decide initially whether an arbitration agreement clearly forbids class arbitration"); *In re Wood*, 140 S.W.3d 367, 368 (Tex. 2004) (directing the arbitrator to decide the class certification issue); *Garcia v. DIRECTV, Inc.*, 9 Cal. Rptr. 3d 190, 191 (Cal. Ct. App. 2004) (stating that arbitrator was to determine whether arbitration agreement permitted class arbitration); *see also* Sternlight & Jensen, *supra* note 13, at 77–85 (describing situations wherein courts will determine unconscionability issues).

[156] Buckner 2, *supra* note 57, at 230.

However, "[t]he concept that the court is an effective watchdog overseeing due process under the hybrid model of class arbitration sounds nice; but it may be more a vestige of the historic mistrust of arbitration than practical reality."[157] Indeed, skeptics such as Carole Buckner have argued that "[a] system that requires continuous judicial intervention, even for the well-intentioned purpose of providing due process, runs afoul of the parties' agreement and therefore violates" state arbitration statutes.[158] Hybrid models thus could lead to non-enforcement under the New York Convention to the extent they contravene the parties' agreed procedure.[159] Furthermore, the additional cost and delay associated with a back-and-forth system of split competence militates against the use of a hybrid model.[160]

The second pre-*Bazzle* model of class arbitration was basically a "court-free" approach, wherein the arbitrator conducted all aspects of the proceedings, including certification, notice, and fairness approvals.[161] *Bazzle* seems to contemplate future use of the "court-free" method, although Maureen Weston has argued that "practical and policy concerns compel thought on the wisdom of entrusting arbitrators with protecting all class members, considering varying levels of arbitral expertise, a complicated procedural process, and the lack of judicial supervision or opportunity for meaningful appeal."[162]

Thus, even prior to *Bazzle* there was no consensus on the procedure that must be adopted in a class arbitration. Since then, the issue of court involvement in class arbitration has shifted from a question to be decided by the courts to one to be decided by the parties as a result of the innovations of two U.S.-based arbitration providers: the AAA and JAMS.[163] Since *Bazzle* was handed down, both organizations have published class arbitration rules that address not only what procedures the arbitrators are to follow, but

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157 *Id.* at 238.

158 *Id.* at 237.

159 *See* New York Convention, *supra* note 1, art. V(1)(d).

160 Buckner 2, *supra* note 57, at 237; *see also* REDFERN & HUNTER, *supra* note 1, para. 5–47 (arguing against court intervention in non-class arbitrations).

161 *See* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 352–54 (S.C. 2002) (describing class arbitration wherein the arbitrator decided all procedural matters), *vacated*, 539 U.S. 444 (2003) (plurality opinion).

162 Weston, *supra* note 20, at 1740.

163 Buckner 2, *supra* note 57, at 239 (discussing how class arbitration procedure has changed post-*Bazzle*).

what involvement courts are to have in the process. Given that the courts and legislatures have not provided any guidance regarding class arbitration procedures, it is likely that most future class arbitrations (in the United States, at least) will follow one or the other of these private rule sets, even though at least one commentator has argued that both sets of rules could permit an arbitrator to disregard due process.[164] While it is true that some commentators advocate a "pure" arbitral model that not only does not embrace either of these two rule sets but also does not incorporate any court involvement (so long as that model is combined with a due process protocol),[165] such a model—which is essentially ad hoc—is difficult to envision and is not suggested herein.

3.2.2. Class Arbitration—Institutional Rules

After the Supreme Court decision in *Bazzle*, both the AAA and JAMS established procedural rules for class arbitrations. Both the AAA and JAMS based their class arbitration rules on Rule 23 of the U.S. Federal Rules of Civil Procedure, leading at least one commentator to claim that the two rule sets "fail to engage with the possibilities of class arbitration" and take an "impoverished view" of the procedure by not taking advantage of the possibility of individually tailored procedures and remedies that are the hallmark of arbitration.[166] However, because "[t]he scope of due process in class action litigation defines the possible scope of due process protection that arbitration providers should consider providing in class arbitration," the AAA and JAMS were well advised to base their procedures on the Federal Rules of Civil Procedure, at least initially, to minimize any potential violations of critical due process protections.[167] Both sets of rules create a semi-hybrid approach to class arbitration, where "judicial involvement is subject to the discretion of. . . the parties."[168] Although neither the AAA nor JAMS claims to ensure that the constitutional or substantive rights of parties proceeding under their rules will be

164 *Id.* at 249.

165 *See id.* at 256 (noting the pure model of arbitration); *see also* Weidemaier, *supra* note 8, at 87–89 (same).

166 Weidemaier, *supra* note 8, at 94–95.

167 Buckner 2, *supra* note 57, at 195.

168 *Id.* at 239, 247.

upheld, the AAA's policy statement on class arbitrations states that, "[i]n fidelity to [the AAA's] Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols."[169] The JAMS Class Arbitration Rules do not currently include a similar statement. Rather than address the two rule sets in *toto*,[170] the following discussion focuses on those aspects of the rules that could result in objections to international enforcement based on due process or public policy concerns.

3.2.2.1. Certification of the Class, Class Counsel, and Class Representatives

In judicial class actions, the court's approval or denial of a class certification request under Rule 23(c)(1) is critical, since that decision often determines whether the litigation proceeds.[171] Either way, the judge's decision imparts serious pressure—if certification is denied, plaintiffs may abandon their numerous, but individually small, claims; conversely, if certification is approved, the defendant(s) will be inclined to settle, no matter what the merits of the case may be, in order to avoid the heavy transactional costs of defending a class action.[172]

Furthermore, when deciding to certify a class, the court must consider the adequacy of both class counsel and the lead (named) plaintiff(s).[173] Indeed, adequacy of representation has been

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[169] American Arbitration Association Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/Classarbitrationpolicy; *see also* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 370 (2004) (stating that due process protocols involving arbitration are not always legally enforceable and depend largely on the mutual cooperation of arbitrators and arbitration services). Commentators differ on whether these protocols are sufficient to address the special needs of class arbitration. *See* Buckner 2, *supra* note 57, at 246–47, 251, 259–63 (describing the lack of due process assurances in class arbitration proceedings as well as initiatives to remedy the problem); Harding, *supra*, at 454 (arguing that the standards for due process protocols must be made more rigorous than they currently are); Weidemaier, *supra* note 8, at 87–88 (noting that if the arbitration agreement does not satisfy the minimum due process protocol requirements, the AAA reserves the right to refuse to hear a case until the requirements are met).

[170] The overall scope of the rule sets have been discussed elsewhere. Weston, *supra* note 20, at 1737–41.

[171] FED. R. CIV. P. 23(c)(1); Weston, *supra* note 20, at 1728.

[172] Weston, *supra* note 20, at 1729.

[173] FED. R. CIV. P. 23(c)(1).

identified as "[t]he touchstone of due process in the class action setting."[174] It has been termed thusly because absent class members remain in the class (and thus will be bound to the terms of the judgment of settlement) unless they opt out, so the court's determination about adequacy of representation (of both counsel and the lead plaintiff) "is a proxy for absent members' due process."[175]

Because certification of a judicial class is one of the areas where due process concerns are at their highest, it should come as no surprise that certification is a complex process under the AAA Supplementary Rules. AAA policy is to administer class arbitrations only when "the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules" or "the agreement is silent with respect to class claims, consolidation or joinder of claims."[176] Even so, there may be instances where one of the parties does not want to proceed with a class arbitration and would dispute certification of a class, regardless of the party's views on how well the class boundaries were drawn. The AAA Supplementary Rules address this issue by requiring arbitrators to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class" and then issue a written "Clause Construction Award" which may be immediately brought to "a court of competent jurisdiction" to be confirmed or vacated.[177] Proceedings are automatically stayed 30 days to allow a court action to be brought, unless the parties advise the arbitrator that they do not intend to seek judicial review.[178] If court proceedings are initiated, the arbitrator may stay some or all of the arbitration, pending the outcome of the judicial action.[179] This allows any arguments about contract construction to proceed

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[174] Buckner 2, *supra* note 57, at 197–98; *see* Weston, *supra* note 20, at 1729 (affirming that adequacy of representation is essential to class arbitrations, since judgments are binding on all members of a class who have not opted out).

[175] Weston, *supra* note 20, at 1729.

[176] American Arbitration Association Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/Classarbitrationpolicy. The AAA will also administer a class arbitration upon court order, such as when a court has ruled a waiver provision invalid. *Id.*

[177] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 3.

[178] *Id.*

[179] *Id.* rule 4.

before the parties and arbitrator have incurred the cost and effort involved in defining an appropriate class.

Once that initial threshold has been passed, the arbitrator considers whether class arbitration is proper under the circumstances of the case. Here, the drafters of the AAA Supplementary Rules copied the language of Rule 23 of the Federal Rule of Civil Procedure almost verbatim, with the exception of AAA Supplementary Rule 4(a)(6), which requires the arbitrator to find that "each class member has entered into an agreement containing an arbitration clause which is substantially similar" to that signed by other class members, including the class representative.[180]

Once the arbitrator decides whether the arbitration should proceed as a class, the arbitrator issues the "Class Determination Award" as a "reasoned, partial final award."[181] If class arbitration is to proceed, the Class Determination Award "shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses."[182] The Class Determination Award also must include the proposed "Notice of Class Determination" and describe the mode of delivery to class members.[183] Furthermore, the Class Determination Award describes "when and how members of the class may be excluded."[184]

Regardless of whether the class is confirmed or denied, the Class Determination Award may be immediately brought to "a court of competent jurisdiction" to be confirmed or vacated.[185] Proceedings are automatically stayed thirty days to allow the court to hear the claim, unless the parties advise the arbitrator that they

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[180] *Id.* rule 4(a)(6); *see also* FED. R. CIV. P. 23(a); Weston, *supra* note 20, at 1738.

[181] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 5(a). A partial final award on clause construction was issued in accordance with the AAA Supplementary Rules in *JSC Surgutneftegaz v. Harvard College* and filed with the Southern District of New York, yielding a Decision and Order that confirmed the ruling handed down by the arbitral tribunal. No. 04-6069, 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007); *see also* President and Fellows of Harvard College Against JSC Surgutneftegaz, 770 PLI/LIT 127 (2008) (reproducing partial final award on clause construction).

[182] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 5(b).

[183] *Id.*

[184] *Id.* rule 5(c).

[185] *Id.* rule 5(d).

do not intend to seek judicial review.[186] Again, if proceedings are brought, the arbitrator may stay the arbitration pending the court's decision.[187] This approach echoes the U.S. Federal Rules of Civil Procedure, which explicitly provide for an interlocutory appeal of the class certification question, based on the recognition that (non)certification can sound the "death knell" of a cause of action.[188] Thus, the possibility of a "second look" on the propriety of the process and the decision exists in both a judicial class action and a class arbitration.

These procedures create a hybrid approach similar to that used prior to *Bazzle*, wherein the court retained responsibility for certification, notice and fairness approvals of the final award, while the arbitrator retained responsibility for evaluating the merits of the case.[189] Although the AAA Supplementary Rules entitle the arbitrator to make the initial class determinations, allowing the parties to seek immediate judicial review of the partial final awards provides the court with some oversight capacity. Such a procedure might overcome the type of "practical and policy concerns" that an entirely court-free system might raise concerning the wisdom of entrusting arbitrators with protecting the due process rights of absent class members.[190] However, though the AAA approach may reflect some concern for absent members' procedural rights, the process has not "acknowledged explicitly that judicial involvement in class arbitration is required or even permitted by a particular constitutional, statutory, or common law authority."[191] Furthermore, foreign courts that are already suspicious of legal procedures that dispose of absent members' rights may exhibit heightened concern when courts may only become involved upon the request of a party, since non-named class members will not usually be sophisticated enough to take that step on their own accord.

Certification of a class is a multi-step process under the JAMS Class Arbitration Rules as well. The procedure is virtually identical to that under the AAA Supplementary Rules, except that there is no requirement that any of the interim awards be issued,

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186 *Id.*

187 *Id.*

188 FED. R. CIV. P. 23(e); Weston, *supra* note 20, at 1728.

189 *See supra* notes 151–62 and accompanying text.

190 Weston, *supra* note 20, at 1740.

191 *Id.* at 1741.

nor is there an explicit period for court review.[192] Though parties can likely request written awards on which to base a court proceeding, the arbitrator holds a great deal of discretion concerning these partial final awards and could conceivably refuse the request. Thus, the JAMS model is closer to the type of court-free system that has raised both practical and policy concerns among commentators, who view such proceedings as a possible "means to avoid judicial scrutiny and accountability for providing procedural fairness in class arbitration altogether."[193]

Because the AAA Supplementary Rules and JAMS Class Arbitration Rules track the U.S. Federal Rules of Civil Procedure so closely, they appear to uphold U.S. notions of due process. Certainly the absence of any court involvement does not appear problematic in the U.S. post-*Bazzle*. Nevertheless, the AAA Supplementary Rules have created a useful quasi-hybrid model that accomplishes several things at once. First, they create a useful record and procedural guideline should court involvement be requested. Second, they minimize the opportunity for challenge after the hearing, not only because the parties are given the opportunity to object as an interlocutory matter, but because any failure to object at an interim stage could be construed by an enforcing court as a waiver of that particular objection under the New York Convention after the completion of the proceedings.[194] The AAA Supplementary Rules thus minimize expenditures of time, money, and effort, both for legitimate and illegitimate (i.e., as a means of delay or obstruction) objections to enforcement.[195]

3.2.2.2. Notice and Settlements

Notice is a fundamental element of procedural due process in U.S. class actions, with courts scrutinizing not only the content of the notice, but also the manner of notice.[196] In the United States, simple publication notice is seldom constitutionally adequate,

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[192] JAMS CLASS ARBITRATION RULES, *supra* note 7, rules 2–4.

[193] Weston, *supra* note 20, at 1740.

[194] REDFERN & HUNTER, *supra* note 1, para. 10–43.

[195] Buckner 2, *supra* note 57, at 258.

[196] *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (stating that notice reasonably calculated to inform parties of pendency of action is fundamental to due process); *see also* Weston, *supra* note 20, at 1730 (proclaiming that mere publication is generally insufficient to meet the requirements of procedural due process).

although other nations permit notice by publication alone.[197] Under actions certified under U.S. Federal Rule 23(b)(3), parties must give the "best notice practicable, including individual notice to all members who can be identified through reasonable effort," whereas under Rule 23(b)(1) or (2), notice is simply permissive or discretionary, in that the court need only "direct appropriate notice to the class."[198] Notice sent by first-class mail to each putative class member, explaining the right to opt out of the litigation, satisfies due process concerns.[199] Notice may be required at different times, such as prior to class certification and prior to settlement.[200]

Although notice is not, by itself, enough to satisfy constitutional concerns,[201] it is central to both domestic and international notions of due process in both litigation and arbitration. Under the AAA Supplementary Rules, the arbitrator shall "direct that class members be provided the best notice practicable under the circumstances."[202] The notice regarding class determination "shall be given to all members who can be identified through reasonable effort."[203] The notice must clearly state the nature of the action; the scope of the class; the class claims, issues, or defenses; and various procedural factors, such as appearance through counsel, exclusion, and the binding effect of the action; biographical information about class counsel and representatives; and how to communicate with the AAA regarding the arbitration.[204]

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197 Weston, *supra* note 20, at 1730; *see also* Gidi, *supra* note 20, at 341 (reporting that the notice requirement in Brazil is fulfilled "by a single publication in an official newspaper").

198 FED. R. CIV. P. 23(c)(2)(A)–(B); Buckner 2, *supra* note 57, at 197. Actions under Rule 23(b)(1) and (2) generally do not involve a claim of damages (as actions under Rule 23(b)(3) do) and typically result in compulsory or mandatory class membership. MULHERON, *supra* note 20, at 31.

199 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

200 FED. R. CIV. P. 23(c)(2), 23(e)(1).

201 *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 397 (1996) (noting that, due process demands adequate representation as well as proper notice); *see also* Buckner 2, *supra* note 57, at 197 (describing adequate representation as a "touchstone of due process").

202 AAA SUPPLEMENTARY RULES, *supra* note 7, rule 6(a).

203 *Id.*

204 *Id.* rule 6(b). The requirements for notice under the AAA Supplementary Rules are roughly similar to the type of content required under the Federal Rules of Civil Procedure for Rule 23(b)(3) class members. FED. R. CIV. P. 23(c)(2)(B).

Notice not only affects whether a putative class member knows that a class arbitration is proceeding, but also affects that person's ability to opt out (which affects future rights to initiate an individual claim) as well as that person's ability to participate in the class proceedings themselves. Thus, the notice requirement is closely linked to the opportunity to be heard.[205] While issues regarding opting out and approval of class counsel and class representatives are not often discussed in the arbitral context, since they typically arise as a due process concern in judicial class actions, the international arbitral community has always been highly protective of a party's ability to participate in arbitration proceedings.[206] Furthermore, the notice provisions affect the individual's ability to choose the arbitrator (though that choice in class arbitration would be limited to opting out), which is another right that has been closely guarded in international arbitration.[207]

The AAA Supplementary Rules also require notice regarding settlement, voluntary dismissal or compromise.[208] Again, the notice must "be provided in a reasonable manner to all class members who would be bound" by such a disposition.[209] Notice at this stage also protects important due process rights, since, under AAA Supplementary Rules, the arbitrator must hold a fairness hearing and can only approve the disposition of a matter "on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."[210] A class member may object to the proposed disposition and the arbitrator may refuse to approve the disposition of the matter unless it allows class members another opportunity to opt out.[211]

Despite the breadth of these notice provisions, the AAA Supplementary Rules do not provide, as the U.S. Federal Rules of Civil Procedure do, for the arbitrator to require additional notices "for the protection of the members of the class" at "any step in the

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[205] Weston, *supra* note 20, at 1730 (explaining that notice and the opportunity to be heard are both crucial to the constitutional guarantee of procedural due process).

[206] LEW ET AL., *supra* note 16, paras. 26-86 to 26-87.

[207] *Id.* para. 10-45.

[208] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 8(a)(2).

[209] *Id.*

[210] *Id.* rule 8(a)(3).

[211] *Id.* rules 8(c)–(d).

action."[212] Furthermore, the AAA Supplementary Rules neither allow putative class members to indicate if they consider representation "fair and adequate," nor do they allow arbitrators to divide a class into subclasses.[213] Nevertheless, the AAA Supplementary Rules contain significant due process protections.

Notice requirements under the JAMS Class Arbitration Rules are very similar to those under the AAA Supplementary Rules.[214] Fairness hearings are required under JAMS Class Arbitration Rule 6(a)(3).[215]

Thus, to the extent that the U.S. Federal Rules of Civil Procedure protect due process, so too do the AAA Supplementary Rules and the JAMS Class Arbitration Rules, though the JAMS Class Arbitration Rules do so to a slightly lesser degree of certainty than the AAA Supplementary Rules, due to their failure to require reasoned partial awards during the clause construction and class certification phases. However, neither set of class arbitral rules creates procedures that necessarily address civil law concerns about representative actions.

3.2.2.3. Confidentiality

The third area of concern involves confidentiality, which is one of the long-enunciated benefits of arbitration.[216] However, the AAA Supplementary Rules violate the presumption of privacy by explicitly stating that class arbitrations shall not be subject to the principle of privacy and confidentiality, although the arbitrator can provide otherwise if he or she deems it appropriate.[217] This shift

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[212] Buckner 2, *supra* note 57, at 252.

[213] *See* AAA SUPPLEMENTARY RULES, *supra* note 7, rule 4 (addressing class certification under AAA Supplementary Rules without any reference to subclasses).

[214] *See* JAMS CLASS ARBITRATION RULES, *supra* note 7, rule 4 (outlining the notice requirements under JAMS Class Arbitration Rules, which closely resemble those of the AAA Supplementary Rules).

[215] *Compare id.* rule 6(a)(3) (stating the arbitrator may only bind class members to a settlement, voluntary dismissal, or compromise after a fairness hearing) *with* FED. R. CIV. P. 23(e)(2) (allowing the court to approve a binding settlement, voluntary dismissal, or compromise only after a fairness hearing) *and* AAA SUPPLEMENTARY RULES, *supra* note 7, rule 8(a)(3) (allowing the arbitrator to approve a settlement, voluntary dismissal, or compromise only after a fairness hearing).

[216] *See supra* note 76 (discussing various scholarly accounts on the role of confidentiality in arbitration).

[217] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 9(a).

from accepted norms may be due to concerns about due process. For example, if proceedings were private, some questions might arise as to whether non-representative plaintiffs could attend the hearing. The AAA Supplementary Rules avoid that problem by stating that "in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings," thus protecting the individual right to be heard in an arbitration.[218] Furthermore, allowing open proceedings permits arbitrators to invite government entities and other potential objectors to any fairness hearings, which complies with the "best practices" in class actions advocated by the Federal Judicial Center.[219]

In addition to reversing the presumption of confidentiality, the AAA Supplementary Rules indicate that the AAA shall maintain a website—similar to the online dockets of many courts[220] as well as the online list of pending and concluded cases maintained by the International Centre for Settlement of Investment Disputes ("ICSID")[221]—containing certain information about the arbitration, including the demand for arbitration, the names of the parties and counsel, a list of the awards made to date, and details regarding any scheduled hearings.[222] Notably, this is one area where JAMS and the AAA differ. The JAMS Class Arbitration Rules contain no language regarding any deviations from the usual presumption

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[218] *Id*.

[219] *See supra* notes 76–80 and accompanying text.

[220] *See, e.g.*, ENG. CIV. PRO. R. PRACTICE DIRECTIONS 5, 5.4C, 5.4D (2008) (outlining the process of obtaining court records for non-parties in England and Wales); Administrative Office of the U.S. Courts, PACER Service Center, http://pacer.psc.uscourts.gov (last visited Sept. 13, 2008) (providing electronic access to U.S. federal court records); *see also* Ulf Öberg, *Public Access to Documents after the Entry Into Force of the Amsterdam Treaty: Much Ado About Nothing?* 2 EUR. INTEGRATION ONLINE PAPERS #8 (1998), http://eiop.or.at/eiop/texte/1998-008.htm (discussing the availability of public documents in Europe).

[221] International Centre for Settlement and Investment Disputes ("ICSID"), List of ICSID Cases, http://icsid.worldbank.org/ICSID/FrontServlet ?requestType=CasesRH&actionVal=ListCases (last visited Sept. 13, 2008). There is precedent for allowing notice of other mass or group arbitrations to be posted on a website. Scott Armstrong Spence, *Organizing an Arbitration Involving an International Organization and Multiple Private Parties: The Example of the Bank for International Settlements Arbitration*, 21 J. INT'L ARB. 309, 317 (2004). Also, the demand for transparency in arbitration is gaining ground. Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1319–20 (2006) [hereinafter Rogers 1].

[222] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 9(b).

about privacy and confidentiality in arbitration, and JAMS does not publish a docket of class arbitrations.

Although the AAA Supplementary Rules appear to protect certain due process rights by reversing the common assumption about confidentiality in arbitration, proceedings under these rules could be subject to objections under article V(1)(d) of the New York Convention if open proceedings appear to contravene the parties' agreement about the arbitral procedure. However, any such debate would likely lead to an analysis of the extent to which parties can deviate from explicit arbitral rules, which is beyond the scope of this Article.[223] Furthermore, the arbitrator has the discretion to set aside this aspect of the AAA Supplementary Rules.

The JAMS Class Arbitration Rules appear to avoid this issue by remaining silent on the issue of confidentiality. However, the reverse problem may arise, wherein objectors and non-named parties could object if they are barred from the hearings.

3.3. Future Implications Regarding International Class Arbitration Procedures

Although the form of class arbitrations will be heavily influenced by the form that representative proceedings take in the national courts where the arbitration is seated, U.S. class procedures will also have a significant impact on the future of international class arbitral procedures, for two reasons.[224] First, the United States is the seat of the greatest number of known class arbitrations (domestic and international),[225] which means that U.S. class action procedure will exert a palpable influencing force on the future shape of international class arbitrations. Second, the only two published sets of class arbitration rules are based on U.S. class action procedure, suggesting that even those class arbitrations that are not seated in the United States might still be influenced by U.S. procedural norms.

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[223] *See, e.g.*, GARY A. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 5 (2001).

[224] American influence on all forms of international arbitration has been increasing over the last ten to fifteen years. Drahozal 1, *supra* note 28, at 233, 243, 246.

[225] *See generally* American Arbitration Association, Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited Sept. 18, 2008) (database listing a large number of U.S. class arbitrations that are administered by the American Arbitration Association).

Although U.S. class actions are considered with some hostility in some parts of the world, they are not an anathema in every jurisdiction. International class arbitrations that are influenced by U.S. class action procedure—either as a result of the influences of the seat of the arbitration or the use of the AAA Supplementary Rules or the JAMS Class Arbitration Rules—can thus expect a mixed reception when parties attempt to enforce their awards outside the United States. However, the following section will show that even those states that disapprove of U.S. class actions (and would therefore be expected to also disapprove of U.S.-style class arbitrations) should still give international class awards the same presumption of enforcement that bilateral awards are entitled to receive under the New York Convention.

4. CLASS ARBITRATION IN THE INTERNATIONAL CONTEXT

As suggested above, objections to international enforcement of class awards are likely, at least initially, given how U.S. class actions are viewed abroad. For example, there is evidence that "foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation."[226] Indeed, practitioners from five European nations went on record with affidavits in *Bersch v. Drexel Firestone, Inc.*, stating that the courts of their countries would not enforce a judgment in a class action suit.[227] Since most class arbitrations will mimic U.S. class actions,

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[226] Buschkin, *supra* note 61, at 1566; *see also* Dreyfuss, *supra* note 32, 6–7 (noting that foreign courts closely scrutinize American judgments arising from class actions).

[227] 519 F.2d 974, 996–97 (2d Cir. 1975) (admitting affidavits from practitioners from the United Kingdom, the Federal Republic of Germany, Switzerland, Italy, and France stating that courts in those jurisdictions would not enforce judgments resulting from American class actions); *see also id.* at 997 & n.48 (noting the affidavits stated that the foreign courts would deny enforcement of a judgment even if the foreign unnamed class members received adequate notice; however, "although the binding effect of a foreign class action judgment upon non-appearing members of the class had not been decided by a court in any of these jurisdictions, [the affidavits stated that] had an 'opt in' form of notice one [sic] which required a class member to sign and return a writing agreeing to be bound by any judgment in the proceeding been adopted by the district court as urged by certain of the defendants, it was far more likely, although still not certain, that in several of these jurisdictions a prior judgment for defendant in the class action would serve as a bar to an action by any person who had joined the class."); Buschkin, *supra* note 61, at 1581 & n.102 (claiming that foreign courts' failure to not enforce judgments from American class actions could lead to foreign plaintiffs' bringing an action for the same injury against the same defendants in foreign courts); Dixon, *supra* note 14, at 134 (arguing that the structure of plaintiff

at least in the near future, international class awards are likely to be subject to these sorts of challenges early on in their development.

However, the case for international class arbitration will be assisted not only by the increased availability of representative actions in domestic courts around the world but by the existence of domestic class arbitrations outside the United States. This phenomenon does not seem to have been discussed in the literature on U.S. class arbitrations, but constitutes significant support in favor of the legitimacy of international class arbitration, since it shows that class arbitration is not a U.S.-only procedure.

4.1. Class Arbitrations Outside the United States

It is difficult to ascertain how prevalent class arbitrations are outside the United States due to (1) the often confidential nature of arbitration; (2) the decreased likelihood that details regarding arbitral procedure will make it into official reports; and (3) language issues. However, there have been reports of class arbitrations outside the United States, though none of these matters appear to have been discussed in the jurisprudence on class arbitration.

First, in *Valencia v. Bancolombia*, a tribunal based in Bogotá, Colombia heard a class suit initiated by shareholders following the merger of two financial entities.[228] Although the claim was initially filed in court, both the civil circuit judge and the District Superior Court held that they had no jurisdiction over the matter, given the existence of an arbitration agreement in the by-laws of one of the financial entities.[229] The plaintiffs argued that class actions in Colombia are subject to the exclusive jurisdiction of the court, but the Supreme Court of Justice rejected that argument on the grounds that the arbitration agreement did not limit the types of claims that could be submitted to arbitration and thus did not exclude class arbitrations as a matter of law.[230] Furthermore, the Supreme Court held that arbitrators have the same duties and

classes may vary depending on whether foreign courts will enforce a judgments resulting from American class actions)

[228] Valencia v. Bancolombia (Colom. v. Colom.), *digest by* Zuleta DIGEST for Institute for Transnational Arbitration (ITA) (Arb. Trib. from the Bogotá Chamber of Comm. 2003), *available at* http://www.kluwerarbitration.com.

[229] *Id.*

[230] *Id.*

powers as a court and thus have the competence to resolve class claims.[231]

The Supreme Court did not go so far as to say that class arbitrations are permitted in Colombia in all circumstances, however. Instead, it stated that:

> Arbitral Tribunals have no jurisdiction in principle to rule upon class actions, since the pertinent decision would involve or affect every individual that finds himself/herself under the same causal link which caused individual damages. . . . However, a different conclusion may arise regarding the shareholders of a Corporation, since these have accepted the inclusion of an arbitration agreement in the bylaws.[232]

The matter was then sent to arbitration so that the tribunal could decide whether the plaintiffs met the threshold requirements (twenty or more people who have suffered damages out of the same cause of action) to proceed as a class.[233] Given the ruling by the Supreme Court, the broad availability of class arbitrations in Colombia appears uncertain, though class proceedings apparently can arise in shareholder actions where arbitration of disputes is contemplated.[234] Furthermore, the decision seems to confirm the civil law suspicion of representative actions that would affect the rights of absent class members except in special cases.

Class arbitrations have also arisen in Canada. *Kanitz v. Rogers Cable Inc.* involved the interplay between the Ontario Arbitration Act and the Ontario Class Proceedings Act, and arose after the plaintiffs filed a class action in court for breach of contract arising out of the provision of cable and high speed internet services.[235] In this case, the Ontario Superior Court of Justice had to construe a clause providing for arbitration and forbidding class proceedings in light of a claim of unconscionability.[236] The court considered the

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231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 Kanitz v. Rogers Cable Inc. (Can. v. Can.), [2002] 58 O.R. (3d) 299, 21 B.L.R. (3d) 104, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www.kluwerarbitration.com.

236 *Id.* para. 39. Unconscionability and class waivers are hot subjects in the United States right now, although they are outside the scope of this Article. *See*

argument that, if such a clause were upheld, individual plaintiffs would be dissuaded from proceeding in arbitration due to the expense in relation to the prospective award, but found the argument unpersuasive given the lack of evidence showing that plaintiffs had, in fact, been dissuaded from proceeding individually in arbitration.[237] The court was also unpersuaded by the argument that plaintiffs would be more likely to proceed as a class, since, by so doing, they would be protected from adverse costs in the case of loss.[238] Furthermore, the plaintiffs claimed that giving effect to the arbitration/no class action clause would defeat the public policies inherent in the Class Proceedings Act.[239] Again, the court found this position uncompelling.[240]

Instead, the court focused on the mutuality of the arbitration agreement to hold that there was no unconscionability.[241] Furthermore, the court stated that although the Arbitration Act and the Class Proceedings Act could be said to have competing public policies, there was no reason to give precedence to one piece of legislation over the other.[242] Instead, the court claimed that it was possible to interpret both enactments in a consistent manner by disallowing the class action in court and instead requiring individual arbitrations.[243] However, a type of class arbitration could be permitted under the consolidation provisions contained in section 20(1) of the Arbitration Act.[244] In particular, the court stated:

> Without deciding the point, it would appear that section 20(1) would permit an arbitrator, at the very least, to

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Buckner 2, *supra* note 57, at 230 (discussing problems associated with dual court-arbitrator competence to decide certain issues); Smit, *supra* note 13, at 201 (discussing the legal status of waivers of class proceedings); Sternlight & Jensen, *supra* note 13, 75–76 (describing methods used by corporate defendants to avoid class proceedings); Weidemaier, *supra* note 8, at 81–86 (discussing how defendants seek to avoid class proceedings in court or in arbitration).

[237] Kanitz v. Rogers Cable Inc. (Can. v. Can.), [2002] 58 O.R. (3d) 299, 21 B.L.R. (3d) 104, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA) para. 42, *available at* http://www.kluwerarbitration.com.

[238] *Id.* paras. 44–46.

[239] *Id.* para. 51.

[240] *Id.* paras. 51–53.

[241] *Id.* paras. 50, 56.

[242] *Id.* para. 51.

[243] *Id.* para. 53.

[244] *Id.* para. 54.

> consolidate a number of arbitrations which raise the same issue. Therefore, it appears at least arguable that if each of the five named representative plaintiffs here chose to seek arbitrations of their claims, an arbitrator might well decide that those arbitrations could be dealt with together thereby saving time and expense for all parties. Such possibilities serve to militate against the central assertion of the plaintiffs that the arbitration clause operates so as to erect an economic wall barring customers of the defendant from effectively seeking relief.[245]

Thus, class arbitrations have not yet reached full maturity in Ontario, but an intermediary step—mass consolidations—appears to have arisen.

However, other provinces in Canada appear open to the concept of class arbitration. For example, the Quebec Court of Appeal noted in *Dell Computer Corp. v. Union des consommateurs* that, although arbitration was improper in this instance (since the arbitration clause had not been properly brought to the consumers' attention), consumer protection claims could, under some circumstances, be arbitrated.[246] Since that case involved a class action,[247] it would appear that the court was leaving the door open for a class arbitration.

Despite these suggestions of a pro-class arbitration stance outside the United States, other reports indicate that some states or arbitrators believe representative actions are improper in international arbitration. For example, a number of claimants came to the Iran-United States Claims Tribunal in 2003 seeking to bring an action "on [their] own behalf and by proxy and representation on behalf of all Iranian citizens."[248] However, the rules of the Tribunal require claimants to "own" their claims, which means that any representative action must fail, since the party bringing it does not have the requisite degree of ownership.[249] As the

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[245] *Id.* para. 55.

[246] Dell Computer Corp. v. Union des consommateurs (not indicated v. Can.), [2005] Q.C.C.A. 570, *rev'd*, [2007] 2 S.C.R. 801, *digest by* Alvarez DIGEST for Institute for Transnational Arbitration (ITA), *available at* http://www.kluwerarbitration.com.

[247] *Id.*

[248] Sheibani v. United States, 1 Iran-U.S. Cl. Trib. Rep. 946, para. 2 (2003).

[249] *Id.* para. 13.

Tribunal stated, "[b]ecause ownership of a claim is a *sine qua non* of a party's standing in a private claim, and because the Claimants have not pleaded such injury or ownership . . . they have no standing to bring this Claim."[250] Since group actions are not permitted under the Claims Settlement Declaration or tribunal precedent,[251] class arbitrations would appear to be barred in any action in front of the Iran-United States Claims Tribunal. This would also appear to be the case in other disputes brought pursuant to specialized arbitral rules or instruments, such as that concerning the Bank for International Settlements.[252]

Although the two decisions against the use of representative proceedings in international arbitration are potentially problematic, the results are not surprising, given the terms of the relevant arbitration rules and the respect given to party autonomy regarding the agreed procedures. Furthermore, the outcome is not as bad for international class arbitration as it could be, since in both instances the arbitrators indicated that class arbitration was inappropriate under the procedures required in the circumstances at hand; at no time did the arbitrators suggest that representative proceedings were universally inappropriate in arbitration. Thus these two cases should be taken as cautionary but not as predictors of future outcomes. Instead, the trend appears to be more in favor of allowing international class arbitration than it is against it.

4.2. International Enforcement of Class Arbitral Awards

Although the existence of domestic class arbitrations in various parts of the world supports the jurisprudential legitimacy of international class arbitration, the real concern will be pragmatic: will an award issued in a class arbitration be enforceable internationally? In the early days of any arbitral innovation, disputes are bound to arise as the legal community identifies potential areas of concern and methods of resolving those concerns. Class arbitration is no different, as parties will likely oppose enforcement of international class awards under the New York Convention on due process and public policy grounds.

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[250] *Id.* para. 14.

[251] *Id.* para. 13.

[252] *See, e.g.*, Spence, *supra* note 221, at 316 (noting instruments permitting arbitration involving the Bank for International Settlements "did not contemplate class action proceedings nor allow [arbitrators] to certify a class").

4.2.1. Due Process Under the New York Convention

When considering the enforceability of international class awards, one must consider not only the usual notions of international due process, but also the procedures that are required to assure due process in a representative proceeding. Indeed, it may be that international class arbitrations, like domestic U.S. class arbitrations, require heightened scrutiny at enforcement in order to protect parties' due process rights.[253]

Due process in the context of representative proceedings has been said to be a "flexible concept," though it:

> requires "fundamental fairness." Courts have construed this provision to require that an individual be given notice and an opportunity for a hearing prior to any deprivation of life, liberty, or property interest. Notice is a fundamental component of due process. In the judicial class action context, due process is the source for many requirements including the right of class members to opt out of the proceedings, the adequacy of representation, judicial oversight, and case disposition fairness approval.[254]

Due process in the context of the New York Convention is also an inherently difficult concept to define, and "[w]hat constitutes due process is not uniform across all the Contracting States."[255] The possibility of variations in the concepts of due process may have "significant consequences for arbitrations which are

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[253] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31–32 & n.4 (1991) (noting limited judicial review of arbitral awards is sufficient to ensure necessary standards are met); Buckner 2, *supra* note 57, at 225–26 (noting that due process is required in class action arbitration); Harding, *supra* note 169, at 382–83 (discussing minimum standards of due process in arbitration).

[254] Weston, *supra* note 20, at 1768–69 (citations omitted); *see also* Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 592 (7th Cir. 2001) (discussing the requirements of fundamental fairness in arbitration hearings); Buckner 2, *supra* note 57, at 195 (same); Park & Yanos, *supra* note 2, at 269 (noting the elasticity of due process).

[255] O'Hare, *supra* note 139, at 184; *see also* Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 9, 11, 16 (2007) (noting that public policy arguments can vary depending on the basic notions of morality and justice in forum states). *But see* BORN, *supra* note 223, at 436–47; Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321–1322 (2003) (noting the harmonization of due process "across national arbitration regimes").

conducted in forums where the notions of due process differ substantially" from those of other nations.[256]

Nevertheless, when considering whether to recognize a foreign arbitral award under the New York Convention, the court must:

> determine whether the parties received the process for which they bargained. For international cases, this implicates a number of special questions. Was there an arbitration agreement? Were the arbitrators honest? Did the loser have the opportunity to present its case? Does the award violate some fundamental public policy?[257]

A court's duty to recognize and enforce foreign awards under the New York Convention is subject to the possible objections set forth in article V.[258] Article V constitutes the exclusive means of challenging the enforcement of an award on either procedural or substantive grounds[259] and provides protection against abusive arbitral procedures by allowing courts to decline to lend their power to support proceedings that lack the necessary integrity or violate the public interest.[260] The protections found in article V(1) "safeguard the parties against private injustice," whereas those found in article V(2) "serve[] as an explicit catchall for the enforcement of a country's own vital interests."[261] The procedural bases for objection found in article V(1) may be raised by the parties, while the substantive bases for objection in article V(2) may be raised by the parties or by the court *ex officio*.[262] "All grounds for refusal of enforcement must be construed *narrowly*; they are exceptions to the general rule that foreign awards must be recognised and enforced. The Convention sets *maximum* standards so that Contracting States cannot adopt legislation which adds grounds for resisting recognition and enforcement."[263]

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256 O'Hare, *supra* note 139, at 184.

257 Park & Yanos, *supra* note 2, at 273–74 (citations omitted).

258 *Id.* at 257. Of course, the duty to enforce a foreign award is also subject to the enforcing court's discretion. REDFERN & HUNTER, *supra* note 1, para. 10-34.

259 Harris, *supra* note 255, at 10.

260 Park & Yanos, *supra* note 2, at 258.

261 *Id.* at 259.

262 Harris, *supra* note 255, at 10.

263 LEW ET AL., *supra* note 16, para. 26-66; *see also* REDFERN & HUNTER, *supra* note 1, paras. 10-33 to 10-34 (noting that the grounds for objections to enforcement set out in article V of the New York Convention are "exhaustive").

This, of course, bodes well for the future of international class arbitration. Under the New York Convention, neither states nor parties can create new grounds for objection based on the representative nature of class arbitration. Instead, any objections to enforcement must fall into an existing provision under article V. However, as discussed below, none of the existing objections to enforcement can be interpreted in such a way as to allow opponents to international class arbitration to overcome (as a blanket rule) the New York Convention's presumption in favor of enforcement.

Commentators in international arbitration agree that due process "is often understood as a 'hard' rule of law, a kind of a core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given."[264] At the very center of due process issues, "the rules cannot be contracted out and they may be applied *ex officio*. In many national laws this core is described as *ordre public* or public policy."[265] As Gabrielle Kaufman-Kohler states:

> The term "due process" here refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principle de la contradiction* and equal treatment. More recently, procedural efficiency has been increasingly advocated by scholarly writers and taken into account in practice by arbitral tribunals and courts. However, it has not achieved the same recognition as [due process and the principle of party autonomy in matters of procedure].[266]

Even within the realm of due process concerns, there appears to be "a hierarchy and various degrees of legal strength and significance," based, apparently, on "how fundamental the rule of due process is considered to be and how serious its violation or

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[264] MATTI S. KURKELA & HANNES SNELLMAN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (2005).

[265] *Id.* at 4; *see also* Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure, in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY 205, 209 (Pieter Sanders ed., 1986) (discussing the elements compromising "public policy").

[266] Kaufmann-Kohler, *supra* note 255, 1321–22 (citations omitted).

disregard is deemed to be."[267] Nevertheless, at a minimum, due process requires "that parties be provided with (1) reasonable notice and (2) an opportunity to be heard," two concepts that are echoed explicitly in the New York Convention.[268] Together, these principles form a "so-called due process defense [that] has been interpreted to 'essentially sanction[] the application of the forum state's standards of due process,'" where the "forum" in question is typically the seat of arbitration.[269]

The fact that the propriety of due process is most likely evaluated in light of the due process standards of the state where the arbitration was seated gives even more weight to the presumption in favor of enforcement of international class awards, at least to the extent that most class arbitrations are currently seated in the United States. Because U.S. courts will likely find the types of due process protections found in the AAA Supplementary Rules and, to a potentially lesser extent, the JAMS Class Arbitration Rules to comply with U.S. notions of due process, class arbitrations seated in the United States are likely to be internationally enforceable as a matter of general due process. However, each of the two core due process principles need to be discussed in more detail, in case the arbitration is not seated in the United States.

4.2.1.1. Lack of Proper Notice

Article V(1)(b) of the New York Convention indicates that "[r]ecognition and enforcement of the award may be refused" on

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[267] KURKELA & SNELLMAN, *supra* note 264, at 5 (emphasis omitted).

[268] Weston, *supra* note 20, at 1770; *see* New York Convention, *supra* note 1, art. V(1)(b) (stating that courts may refuse enforcement of an award if the party against whom it is invoked did not receive notice or have an opportunity to be heard).

[269] Osamu Inoue, Note & Comment, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247, 247 (2000) (citation omitted); *see also* O'Hare, *supra* note 139, at 184 (noting that due process is comprised of notice and the right to a full opportunity to address claims brought). Some have asked whether arbitrators must consider the laws of every possible place of enforcement, but typically the answer is "no," since the arbitrator may not be able to anticipate where enforcement will be sought. Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. INT'L ARB. 307, 312 (2003); *see also* LEW ET AL., *supra* note 16, para. 26-81 (stating that considering the law chosen by the parties or the law at the place of arbitration is typically sufficient).

proof that "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings."[270] The term "proper notice" in international arbitration means that:

> a party must be informed about the initiation of the proceedings in order to give him an opportunity to organize his defence and other action . . . . When the notice is "proper" must be assessed on the basis of the arbitration agreement and other applicable procedural rules including the law of the seat of arbitration. If what constitutes proper notice is not well defined by the rules or law referred to in the arbitration agreement, the issue may become problematic as to the choice of applicable procedural rules. Proper notice is required in order to allow a party to "present his case." Thus the proper notice requirement is part of "presenting one's case," a condition precedent required absolutely to constitute due process and to make the rendering of an enforceable award possible. In the absence of other more specific rules, proper notice must at the minimum contain information that legal proceedings are pending, the reference to the grounds for the jurisdiction and the identity of the parties.[271]

The question, therefore, is whether JAMS's and the AAA's "best notice practicable" constitutes "proper notice." "Proper notice" in the context of international arbitration has been construed as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested in make their appearance."[272] Furthermore, both the AAA and JAMS contemplate notice to putative class members who can be "identified through reasonable effort,"[273] which would correlate with the totality-of-the-circumstances approach of the

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[270] New York Convention, *supra* note 1, art. V(1)(b).

[271] KURKELA & SNELLMAN, *supra* note 264, at 17–18 (citations and emphasis omitted)

[272] Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc. (P.R.C. v. U.S.), 31 Y.B. COM. ARB. 1105, 1118 (2005) (citation omitted).

[273] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 6(a); JAMS CLASS ARBITRATION RULES, *supra* note 7, rule 4.

New York Convention. Thus, the two standards appear consistent, resulting in the presumptive enforceability of international class awards.

Additionally, the magnitude and efficacy of the potential notice efforts will be taken into account in enforcement proceedings under the New York Convention, which should assist claimants in class arbitration. For example, in *Employers Ins. of Wausau v. Banco de Seguros del Estado*, the Seventh Circuit noted in the context of an arbitration instituted against more than 100 underwriters at Lloyd's that "[n]o reasonable person could be expected to serve more than 100 copies (that is, one copy for each retrocessionaire) of the same motion" on the registered agent for service of process and the Commissioner of Insurance.[274]

Sufficiency of notice is typically to be determined by the law of the arbitral forum or the procedural law of the arbitration, supplemented by any relevant institutional rules.[275] However, in some cases notice is evaluated under the standards of the enforcing state, albeit not with detailed reference to the rules and procedures applicable to court proceedings.[276] This is problematic for international class arbitrations, since it shifts the focus from the due process standards of the arbitral seat to the due process standards the enforcing state, and it can be difficult for arbitrators to anticipate where enforcement might take place. Furthermore, this analytical shift presupposes the application of a different (national) set of due process criteria, despite the fact that violations of due process should be considered under international (as opposed to domestic) standards.

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[274] Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937, 945 (7th Cir. 1999) (proceeding under the Panama Convention, but applying New York Convention standards).

[275] LEW ET AL., *supra* note 16, at para. 26–81 (noting notice should be evaluated in light of the "standards set by the law chosen by the parties to govern the arbitration, or alternatively by the law at the place of arbitration"); *see also* Unión de Cooperatives Agrícolas Epis-Centre v. La Palentina SA (Fr. v. Spain) 27 Y.B. COM. ARB. 533, 538 (2002) (noting that sufficiency of notice must be considered in light of the arbitral rules the parties had agreed would apply).

[276] *See, e.g.*, Jiangsu Changlong Chem. Co. v. Burlington Bio-Med. & Sci. Corp., 399 F. Supp. 2d 165, 168 (E.D.N.Y. 2005) (noting that an argument against enforcement requires a showing that the arbitration was conducted in violation of the due process standards of the enforcing state); KURKELA & SNELLMAN, *supra* note 264, at 47 (noting that the procedural rules of state courts only apply if agreed upon by the parties).

Nevertheless, national courts have improperly shifted the focus of the due process analysis in the past. For example, in *Seller (Russian Federation) v. Buyer (Germany)*, the Court of Appeal of Bavaria relied on article V(1)(b) of the New York Convention when refusing to enforce a Russian arbitral award.[277] Under Russian law, dispatch of notice constituted due process, even if the respondent did not actually receive that notice.[278] However, because "the legal fiction of receipt is not sufficient for valid notice" under German law, the Bavarian Court of Appeal refused enforcement.[279]

Although this case and others like it appear to be decided on the basis of article V(1)(b) alone, they seem to implicitly invoke the public policy exception under article V(2)(b) as well, which would explain the references to German standards regarding proper notice (as discussed below, objections based on article V(2)(b) of the New York Convention are analyzed under the law of the enforcing state).[280] This conclusion is supported by other cases that indicate that the violation of the right to a fair arbitral procedure — which would, by necessity, require proper notice—can constitute a violation of German public order.[281] Other nations have also viewed notice issues through the lens of their own particular constitutional norms, again possibly because of the public policy implications.[282] Indeed, commentators have explicitly recognized

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[277] *Case Law on UNCITRAL Texts Case 402:* Bayerisches Oberstes Landesgericht, 27 Y.B. COM. ARB. 445 (2002) and 263 (2002) [hereinafter CLOUT Case 402].

[278] *Id.* at 264.

[279] *Id.*

[280] *See infra* notes 304–22 and accompanying text.

[281] Buyer v. Seller (Den. v. F.R.G.), 4 Y.B. COM. ARB. 258 (1979) (dealing with failure to give notice of the names of the arbitrator and noting that, "As the right of the parties to challenge has a fundamental meaning for a fair arbitral procedure, the exclusion of this right constitutes a violation of the German public order").

[282] *See, e.g.*, Jiangsu Changlong Chem. Co. v. Burlington Bio-Med. & Sci. Corp., 399 F.Supp. 2d 165, 168 (E.D.N.Y. 2005) (relying on enforcing state's notions of due process, not forum state's); Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc. (P.R.C. v. U.S.), 31 Y.B. COM. ARB. 1105, 1118 (2005) (citing U.S. Supreme Court precedent concerning due process requirements of notice in the context of an international enforcement proceeding); Unión de Cooperatives Agrícolas Epis-Centre v. La Palentina SA (Fr. v. Spain), 27 Y.B. COM. ARB. 533, 538–39 (2002) (noting procedural safeguards must be examined "in accordance with the criteria established by the Constitutional Court, which is the highest interpreter of the fundamental provisions in whose principles, rights and liberties international public policy is embodied"); Italian Party v. Swiss Co., 29 Y.B. COM.

that there is some overlap between violation of due process guarantees of article V(1)(b) and the public policy provisions of article V(2)(b).[283] However, rather than disguising a public policy objection as a due process concern, the better approach would be to indicate squarely that an objection is being made under article V(2)(b), since that will help the enforcing court identify the proper standard to be applied.[284]

When courts consider motions to enforce class awards, they must recognize that "proper notice" in arbitration requires a factual determination involving an investigation into the circumstance of the case rather than a strict application of periods that may be specified in, for example, court rules.[285] Furthermore, the form and content of the notice is as important as the giving of notice itself.[286] However, the due process review only seems to apply to violations at the most fundamental level; parties can approve minor variations in procedure.[287]

The propriety of notice in class arbitration will doubtless be affected by what is considered proper notice in judicial class or representative actions. Different jurisdictions take different approaches to notice in representative actions. For example, in Australia, individual personal notice is only used as a last resort and in circumstances where it is "reasonably practical" and not unduly expensive.[288] It is more common in Australia to give notice by publication.[289] In Ontario, courts consider a variety of matters (including the cost of notice and the class size) when determining how notice must be given.[290] In practice, individual personal

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ARB. 819, 829 (2004) ("Denial of due process is in principle a violation of procedural public policy.").

283 Harris, *supra* note 255, at 10, 17.

284 Objections under the New York Convention's public policy provision are considered below. *See infra* notes 304–55 and accompanying text.

285 REDFERN & HUNTER, *supra* note 1, para. 10-40; O'Hare, *supra* note 139, at 183.

286 For example, notice must disclose the names of the arbitrators. LEW ET AL., *supra* note 16, para. 26-85.

287 Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937, 942 (7th Cir. 1999).

288 MULHERON, *supra* note 20, at 344. However, personal notice has been required for as many as 60,000 class members. *Id.* at 345.

289 *Id.* at 344–45 (quoting FCA (Aus). S 33Y(5)).

290 *Id.* at 346.

notice is typically ordered in conjunction with other types of notice so as to give effect to opt-out provisions.[291]

The U.S. regime lies at the other end of the spectrum.[292] Notice is mandatory in a Rule 23(b)(3) damages suit, since individual members have the right to opt out.[293] Thus, in the United States, if class members are identifiable, individual notice constitutes the "best notice practicable."[294] For any remaining class members, the "best notice practicable" can constitute notice by mail, by posting on dedicated internet sites or through publication in traditional media.[295]

Thus, to create an internationally enforceable class award, the arbitrator should comply to the greatest degree possible with the notice provisions of the state in which the arbitration is seated or the procedural law that otherwise controls, particularly if the state has defined the necessary standards for notice in a large, representative proceeding. While it can be useful to consider also the notice provisions of the enforcing state—in case lack of notice rises to the level of a public policy concern—it is not required. Class arbitrations that follow the AAA Supplementary Rules and JAMS Class Arbitration Rules will comply, on the whole, with U.S. notions of due process. Thus, class arbitrations that follow one of these rule sets and are seated in the United States should avoid most objections based on lack of notice. Furthermore, U.S. notions of notice in class proceedings compare favorably with notions of notice in other states' representative proceedings (in that the U.S. standards are more stringent), suggesting that compliance with the AAA Supplementary Rules or JAMS Class Arbitration Rules will meet local standards for class arbitrations seated in other common law countries.

Complying with these suggestions does not guaranteed an enforceable award in every jurisdiction. Civil law concerns about representative actions may mean that actual notice —as opposed to

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[291] *Id.* at 346, 352.

[292] *Id.* at 347.

[293] FED. R. CIV. P. 23(c)(2)(B).

[294] MULHERON, *supra* note 20, at 348; Sherman, *supra* note 27, at 410. Actions under Rule 23(b)(1) and 23(b)(2) typically result in mandatory class membership, so notice standards are more lenient. MULHERON, *supra* note 20, at 31.

[295] *See* 4 MANUAL FOR COMPLEX LITIGATION § 21.311 (2004) (detailing certification notice procedures for class actions); MULHERON, *supra* note 20, at 349 (stating that the "best notice practicable" can include television, radio, or journal publication).

"reasonably practicable notice"—is required to bind non-representative class members in civil law states.[296] This difference in approach is not based on the language of the New York Convention—since article V(1)(b) only requires "proper notice" —but on civil law systems' anticipated public policy concerns. Though cases and commentary concerning notice requirements under article V(1)(b) of the New York Convention indicate that compliance with the notice provisions of the applicable procedural rules (such as the AAA Supplementary Rules or the JAMS Class Arbitration Rules) would be enough to make an award enforceable, the fact that a notice/due process issue can result in a public policy violation under article V(b)(2) of the New York Convention suggests that parties and arbitrators would be well advised to consider also the notice requirements in any possible enforcing states.

4.2.1.2. Inability to Present One's Case

Notice is not the only due process concern implicated in international enforcement proceedings. Article V(1)(b) of the New York Convention indicates that "[r]ecognition and enforcement of the award may be refused" on proof that "[t]he party against whom the award is invoked was . . . otherwise unable to present his case."[297] To some, "[t]he ability to present one's case appears to be the most fundamental due process rule."[298] Some national laws require a "full opportunity" to present one's case, whereas others only require a "reasonable opportunity" to do so.[299]

Interestingly, "if a party has been denied his right to retain legal counsel of his choice to represent him, this may constitute 'unability' under the Convention."[300] This is of course problematic in a situation where absent class arbitration members are given little opportunity to "shop around" for counsel.[301] However, the

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[296] Civil law nations may also require an opt-in rather than an opt-out system. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 997 & n.48 (2d Cir. 1975) (describing affidavits from several civil law lawyers indicating that class action judgments might be enforceable in their home jurisdictions if the case involved opt-in, rather than opt-out, procedures).

[297] New York Convention, *supra* note 1, art. V(1)(b).

[298] KURKELA & SNELLMAN, *supra* note 264, at 18 (italics omitted).

[299] LEW ET AL., *supra* note 16, para. 26-87.

[300] KURKELA & SNELLMAN, *supra* note 264, at 17.

[301] However, absent class members who receive notice of the proposed class counsel and object to that person may always opt out of the proceedings.

AAA Supplementary Rules expressly contemplate the possibility of non-named parties having their own counsel.[302]

The primary problem for class arbitration, of course, is that non-representative parties have very few real opportunities to influence the shape of the case. However, the AAA Supplementary Rules do provide that all parties, including non-representatives and their counsel, have the right to be present at the hearing, which is one way to alleviate this concern.[303] Furthermore, the arbitrator's duty to undertake a fairness hearing upon disposition of the claim under both the AAA Supplementary Rules and the JAMS Class Arbitration Rules suggests that absent class members' concerns are not disposed of without independent and objective analysis.[304]

Since the AAA and JAMS both modeled their rules on the U.S. Federal Rules of Civil Procedure, arbitrations seated in the United States should pass scrutiny so long as the enforcing state does not consider the nature of representative actions to be a fundamental violation of the right to be heard such that it rises to the level of a public policy concern, thus shifting the focus from the standards of the arbitral forum to the standards of the enforcing state. Arbitrations seated outside the United States will likely stand or fall depending on the extent to which the jurisdiction permits representative actions in the national courts. Nevertheless, a class arbitration seated in an otherwise hostile jurisdiction should still be presumed enforceable on the grounds that (1) courts should give primacy to any selected arbitral rules (assumed, in this case, to be the AAA Supplementary Rules or JAMS Class Arbitration Rules) over non-mandatory provisions of national procedural law; and/or (2) the absence of a timely objection results in a waiver (assuming, in this case, that the motion to set aside is made after the conclusion of the hearing rather than after the issuance of one of the partial final orders concerning clause construction or class certification).[305]

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302 AAA SUPPLEMENTARY RULES, *supra* note 7, rule 9(a).

303 *Id.* The JAMS Class Arbitration Rules are silent on this point.

304 *Id.* rule 8(a)(3); JAMS CLASS ARBITRATION RULES, *supra* note 7, rule 6(3).

305 Of course, there is always the question of whether a national court that takes a robust view of the negative principle of *Kompetenz-Kompetenz* would even hear an interim motion. *Cf.* N.C.P.C. art. 1458 (Fr.) (codifying the negative *Kompetenz-Kompetenz* principle in France); John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational*

4.2.2. Public Policy Under the New York Convention

The second major area of concern regarding the international enforcement of class awards under the New York Convention involves the public policy exception in article V(2)(b). Representative or collective actions are not common outside the United States, and many nations have refused to adopt similar procedures into their national systems and/or enforce U.S. judgments arising out of a class proceeding, suggesting that there could be some hostility to the enforcement of international class awards.[306]

However, even states that oppose representative actions in their courts should still enforce class awards because arbitration is a mechanism that welcomes flexibility, informality, and innovation.[307] Furthermore, even those states that express concern about forcing absent members to relinquish control over valid causes of action should still enforce class arbitral awards, since it can be said that absent class members have affirmatively chosen to exercise their individual rights at this time and in this way.[308] This choice is demonstrated either through the initial agreement to arbitrate (since that agreement can be construed to bind the signatories to whatever procedure the arbitrator deems proper in his or her discretion, subject only to the parties' explicit instructions and the application of any relevant arbitral rules or mandatory provisions of law) or through absent class members' failure to opt out of the proceedings.

Article V(2)(b) of the New York Convention indicates that "[r]ecognition and enforcement of the award may . . . be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."[309] Public policy concerns may be raised by the

Perspective, 36 VAND. J. TRANSNAT'L L. 1115, 1124 (2003) (discussing difficulties in defining the proper scope and application of negative *Kompetenz-Kompetenz*).

306 *See supra* notes 90–121 and accompanying text.

307 Weidemaier, *supra* note 8, at 96.

308 Baumgartner 1, *supra* note 26, at 320–21; Cappalli & Consolo, *supra* note 46, at 264; Gidi, *supra* note 20, at 344–45.

309 New York Convention, *supra* note 1, art. V(2)(b).

parties or by the court *ex officio*.[310] "Public policy" is not defined in the New York Convention,[311] but the underlying rationale is "the right of the State and its courts to exercise ultimate control over the arbitral process."[312] Public policy is a fluid concept, changing to suit the needs of society.[313] Although leading arbitrators believe that public policy "plays a much greater role in the theory of arbitration than in practice,"[314] the argument does arise on occasion, albeit typically only when other objections fail.[315]

Although critics have claimed that "there is no meaningful guidance at all concerning how [both industrialized and developing countries] would interpret the public policy exception,"[316] some efforts have been made at harmonizing, or at least explaining, national laws. In July 2000, the International Law Association issued a Report on Public Policy as a Bar to Enforcement of International Awards ("ILA Interim Report"), which is to be read together with the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards ("ILA Final Report") issued in 2002.[317]

The two reports "attempt[] to define public policy by reference to 'violations of basic notions of morality and justice,'" but, even

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[310] *See* Harris, *supra* note 255, at 10 (detailing the applicability of the "public policy" exception to enforcement under article V(2)(b) of the New York Convention).

[311] *See* KURKELA & SNELLMAN, *supra* note 264, at 11 (noting that "[w]hat constitutes the public policy of a country" is not defined in the New York Convention).

[312] LEW ET AL., *supra* note 16, para. 26-114.

[313] *See id.* paras. 26-117, 26-144 (asserting that public policy is, by its nature, dynamic, and shifts readily to reflect evolving cultural norms); Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 177, 179 (Pieter Sanders ed., 1986) (discussing the concept of public policy).

[314] Böcksteigel, *supra* note 313, at 179.

[315] LEW ET AL., *supra* note 16, para. 26-114.

[316] Harris, *supra* note 255, at 11. This is because dozens of nations have no reported decisions involving domestic interpretation of the New York Convention. *See id.* at 21–22 (listing those countries).

[317] INTERNATIONAL LAW ASSOCIATION, PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL AWARDS (2000) [hereinafter ILA Interim Report], *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/19 (follow link for "Conference Report London 2000"); INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS (2002) [hereinafter ILA Final Report], *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/19 (follow link for "Conference Report New Delhi 2002").

more importantly, look at how public policy is used in international instruments and national legislation.[318] National laws vary somewhat, but "[i]t appears that there is one universally accepted definition of public policy. 'It is clear that [it] reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community.'"[319]

Article V(2)(b) of the New York Convention indicates that the only relevant public policy is that of the state where enforcement is to take place.[320] Foreign public policy is not typically considered in enforcement proceedings, "notwithstanding the fact that private international lawyers increasingly discuss the issue of application (or taken into account) of foreign public policy in a favourable manner" in other contexts.[321] Objections based on public policy may be procedural (primarily involving due process issues) or substantive.[322] Each will be discussed separately below. Neither provides persuasive grounds for overcoming the presumption of enforceability that the New York Convention provides all arbitral awards, including those arising out of a class arbitration.

4.2.2.1. Procedural Public Policy

Procedural public policy sometimes overlaps with due process requirements found in article V(1)(b) of the New York Convention.[323] Furthermore, "possible procedural public policy grounds include fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award;

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[318] Loukas Mistelis, *"Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards*, 2 INT'L L. F. DU DROIT INTERNATIONALE 248, 249 (2000) [hereinafter Mistelis 2].

[319] KURKELA & SNELLMAN, *supra* note 264, at 11. For example, in England "[i]t has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised." Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras Al Khaimah Nat'l Oil Co. [1987] 2 Lloyd's Rep. 246, 254; *see* LEW ET AL., *supra* note 16, para. 26-115 (noting constituent elements of public policy); P.B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 INT'L & COMP. L.Q. 1, 7 (1993) (arguing that principles informing public policy are those of general moral application).

[320] LEW ET AL., *supra* note 16, para. 26-82.

[321] Mistelis 2, *supra* note 318, at 253.

[322] *Id.* at 251.

[323] ILA Final Report, *supra* note 317, para. 29.

manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration."[324] Regardless of whether they are substantive or procedural, public policy objections under the New York Convention "must be construed narrowly."[325] Critically, "only violation of the enforcement state's public policy with respect to international relations (international public policy or *ordre public international*) is a valid defence."[326] Domestic public policy concerns are not enough to bar enforcement.[327]

When deciding whether the New York Convention's public policy exception to enforcement applies, courts look to their own law—i.e., the law of the enforcing state.[328] The form and scope of any court review is limited. Commentators and courts are "unanimous" on this point, stating:

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[324] LEW ET AL., *supra* note 16, para. 26-117. This is generally in accordance with other views, although "[i]t is widely accepted that procedural public policy should not include manifest disregard of the law or the facts." ILA Final Report, *supra* note 317, para. 29.

[325] LEW ET AL., *supra* note 16, para. 26-114.

[326] *Id.*; *see also* ILA Final Report, *supra* note 317, paras. 10–11 (comparing "international public policy" to "transnational public policy"); Yves Brulard & Yves Quintin, *European Community Law and Arbitration*: *National Versus Community Public Policy*, 18 J. INT'L ARB. 533, 546 (2001) (discussing application of European Community-wide public policy). International public policy includes concerns about "biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law." LEW ET AL., *supra* note 16, para. 26-118.

[327] LEW ET AL., *supra* note 16, para. 26-114; *see* ILA Final Report, *supra* note 317, paras. 10–11; Brulard & Quintin, *supra* note 326, at 546 (discussing interplay between domestic and European Community-wide public policy). An interesting—and apparently open—question is "whether the existence of a large number of procedural defects constitutes a violation of due process or the principles of public policy." C v. Z, 31 Y. B. COM. ARB. 583, 585 (2006).

[328] New York Convention, *supra* note 1, art. V(2)(b); *see also* Brulard & Quintin, *supra* note 326, at 546 (noting that in enforcement actions that "it is the public policy of the *lex fori* that is considered by the judge, which entails an examination of the award's conformity with the public policy of his own jurisdiction"); Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. INT'L ARB. 135, 143 (2001) (noting enforcement actions look to the public policy of the enforcing state). Traditionally, the only time the public policy of the *lex arbitri* would be considered is when a party has brought a motion to vacate or set aside the arbitral award, since motions to set aside or vacate an arbitral award are typically made in the state where the arbitration was seated. *See, e.g.*, Böcksteigel, *supra* note 313, at 189; Brulard & Quintin, *supra* note 326, at 546.

> [T]he national judge excludes review of the substance of the arbitration decision. It must relate not to the *evaluation* made by the arbitrators of the rights of the parties, but rather to the *solution* given to the dispute, with the award being annulled only insofar as this solution runs counter to public policy.[329]

Although class arbitration would appear to be reviewable as a "solution given to the dispute" rather than the "evaluation made by the arbitrators of the rights of the parties,"[330] the method of the solution—i.e., class or representative treatment—is not itself counter to public policy, as discussed below.[331] Therefore enforcing courts should take heed of the New York Convention's presumption in favor of enforceability of awards.

Only rarely have awards been successfully opposed at the enforcement stage as a result of a violation of international public policy.[332] For example, England did not refuse enforcement of an arbitral award on the grounds of public policy until 1998.[333] South Korea and Switzerland both use a narrow interpretation of public policy, but retain some focus on the interests and beliefs of the enforcing state.[334] In the United States, the prevailing pro-arbitration policy also results in few challenges succeeding on the basis of the public policy exception.[335] Other jurisdictions that have reportedly taken a narrow view of the public policy exception include Germany, Luxembourg, The Netherlands, Switzerland,

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329 Brulard & Quintin, *supra* note 326, at 544 (quoting Judgment of the French Cour de Cassation, Applix, Paris, Oct. 14, 1993, REV. ARB. 1994) (emphasis added).

330 *Id.*

331 *See infra* notes 356-69 and accompanying text.

332 REDFERN & HUNTER, *supra* note 1, para. 10-51; Schwebel & Lahne, *supra* note 265, at 206.

333 *See, e.g.*, Soleimany v. Soleimany [1999] Q.B. 785 (refusing enforcement of an award of public policy grounds); LEW ET AL., *supra* note 16, paras. 26-119 to 26-122 (discussing *Soleimany*).

334 *See* LEW ET AL., *supra* note 16, paras. 26-127 to 26-129 (discussing Korean and Swiss case law).

335 *See, e.g.*, Parsons Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (noting "the [New York] Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice"); *see generally* REDFERN & HUNTER, *supra* note 1, paras. 10-52 to 10-53 (describing public policy challenges to arbitral award enforcement)

Russia, Italy and India.[336] However, some jurisdictions—including Turkey, Japan, Vietnam and China—have been criticized for their broad use of the public policy exception.[337]

The question exists whether there can be any procedural errors that rise to the level of a public policy violation under article V(2) of the New York Convention that are not covered by the grounds for objection under article V(1). Certainly "if the form and the underlying process by which an arbitral award was created do not meet all potentially applicable domestic procedural requirements, there will be confusion over where and to what extent the award will be enforceable, particularly if it involves transnational commerce," but that does not answer the deeper question of what procedural public policy concerns might exist other than those enumerated in article V(1) of the New York Convention.[338] As it currently stands, commentators have typically take the procedural objections outlined in article V(1) as conclusively defining the corpus of international procedural public policy, or—even more generally—have defined international procedural public policy as simply constituting equal treatment, fair notice and the right to present one's case.[339] This, of course, is good for international class arbitration, since blanket due process objections to class proceedings cannot stand under the New York Convention.

Objections to class awards based on procedural public policy will likely mirror those made under article V(1)(b) of the New York Convention, although, to be considered legitimate grounds for non-enforcement by the international arbitral community, they must rise to the level of a gross violation of due process, judged by international, rather than domestic, standards. Although there should be few such rulings in theory, courts have been willing to invoke their own due process standards to remedy even mid-level violations of due process.[340] Notably, this sort of interventionist approach is discouraged and presumptively improper under the New York Convention.

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[336] Harris, *supra* note 255, at 14–15.

[337] REDFERN & HUNTER, *supra* note 1, para. 10-54. *But see* Harris, *supra* note 255, at 15 (claiming that Japan takes a restrictive view of the public policy exception).

[338] Schwebel & Lahne, *supra* note 265, at 206.

[339] *Id.* at 216.

[340] *See supra* notes 277-84 and accompanying text.

4.2.2.2. Substantive Public Policy

Objections to enforcement of a foreign arbitral award may also be based on substantive public policy concerns such as "(1) mandatory rules/*lois de police*; (2) fundamental principles of law; (3) actions contrary to good morals, and (4) national interests/foreign relations."[341] Substantive grounds for objection also include violations of the principle of good faith and *pacta sunt servanda*, prohibition of abuse of rights and prohibition of activities that are *contra bonos mores*,[342] as well as awards involving punitive damages and breaches of competition law.[343] Some commentators distinguish mandatory provisions of law from public policy, even though that may be difficult to do as a practical matter.[344]

Interpretation of substantive public policy is methodologically the same as it is for procedural public policy, in that objections under the New York Convention must be construed narrowly, applying international rather than domestic standards.[345] Though objections based on substantive public policy are, like objections based on procedural public policy, viewed from the perspective of the enforcing state, some question has arisen as to whether the public policy of other potentially interested states can or should be taken into account.[346] The issue arises most often in the context of antitrust or competition law, or similar laws with a particular economic purpose.[347] The question in the context of class arbitrations will likely be whether class arbitration impedes or advances laws intended to protect parties that are presumed to be

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341 ILA Interim Report, *supra* note 317, at 15 (emphasis omitted).

342 *Id.* at 28.

343 LEW ET AL., *supra* note 16, para. 26-118.

344 *See* KURKELA & SNELLMAN, *supra* note 264, at 11 (noting that distinguishing between mandatory substantive law and public policy can be problematic); Böcksteigel, *supra* note 313, at 183 (noting the distinction between mandatory rules and public policy).

345 LEW ET AL., *supra* note 16, para. 26-114.

346 *See* ILA Final Report, *supra* note 317, para. 20 (stating the prevailing view that "only the public policy of the State where enforcement is sought should be applied").

347 *Id.* para. 50. Some commentators note "national courts' growing leniency towards the arbitrability of areas strongly marked by social and economic policies." Homayoon Arfazadeh, *Arbitrability under the New York Convention: the* Lex Fori *Revisited*, 17 ARB. INT'L 73, 76 (2001). It could be argued that deterrence of certain economic abuses is a global issue, thus requiring class actions and/or arbitrations on a global scale. Buschkin, *supra* note 61, at 1588–93.

in inferior bargaining positions, such as wage-earners, commercial agents, consumers and/or shareholders.[348] Interestingly, this has been one of the areas where civil law systems seem inclined to permit representative actions, albeit usually as a result of legislative authority.[349] Although some states might wish to keep these sorts of economic concerns in the public realm because the manner of their resolution affects the public interest, it could be said that recognizing a form of representative right in these areas of law opens the door to class arbitration. Certainly precedent suggests that matters involving substantive public policy may properly be resolved in the arbitral realm. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the U.S. Supreme Court indicated that arbitrators had the right and the ability to consider matters that had a significant impact on American public policy—in this case, U.S. antitrust laws.[350]

There is some question about the extent to which individual states' public policies should influence the arbitration when the law of that state has not been chosen to govern the dispute.[351] However, in the case of international class arbitrations, the international character of the dispute should lead arbitrators to apply nothing other than international—rather than individual domestic—public policy.[352] Only if the enforcement of the award

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[348] ILM Interim Report, *supra* note 317, at 17; Arfazadeh, *supra* note 347, at 77–78.

[349] *See, e.g.*, Council Directive 98/27, 1998 O.J. (L 166) 51 (EC) (concerning consumer protection); *see also* Drahozal & Friel, *supra* note 97, at 362 & n. 23 (describing the diversity of consumer protection enactments at the European level).

[350] 473 U.S. 614, 633, 638 (1985).

[351] Case C-126-97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, [1999] ECR I-3055; Brulard & Quintin, *supra* note 326, at 533 (discussing *Eco Swiss*).

[352] This approach would also apply when considering "whether a principle forming part of [an enforcing state's] legal system must be considered sufficiently fundamental to justify a refusal to recognize or enforce an award." ILA Final Report, *supra* note 317, rec. 2(b). Thus, for example, "a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration." *Id.* Furthermore, "[w]hen considering whether a principle is sufficiently fundamental to justify refusing enforcement, the enforcement court is entitled to have regard to the connections the parties and the subject matter have with the jurisdiction where enforcement is sought. Where there are few connections, the court would be entitled to take a more liberal approach." *Id.* para. 40. These recommendations support the conclusion that the propriety of international class arbitration should be evaluated under

would "manifestly disrupt the essential political, social or economic interests" protected by the rule of public policy, should the policy be given effect.[353]

Because class arbitration is an entirely new mechanism in the international arbitral realm, it does not fit easily into the standard analytical model regarding substantive public policy. It is most likely that objectors will focus their arguments on how class arbitration violates fundamental principles of law concerning the exercise of individual procedural rights in the enforcing state. Objections could also be based on any punitive damages elements (though those could be severable[354]) or on the claim that matters involving substantive public policy, especially economic policy, exist outside the realm of arbitration (though that argument has become questionable in many jurisdictions).[355] Interestingly, states that would otherwise be hostile to class arbitration may find consumer arbitrations less objectionable, since that is an area where an increasing number of national or regional legislatures have created a form of representative action.

4.2.2.3. Public Policy Objections to Class Action Judgments

Although there are no cases yet describing enforcement of international class awards, it is useful to see how non-U.S. states deal with requests to enforce judgments arising out of U.S. class actions against non-U.S. corporate defendants.[356] In actions to enforce judgments, courts typically look to see whether the judgment violates the enforcing state's notions of substantive or procedural public policy, which is similar to the procedure used for objections under article V(2)(b) of the New York Convention.[357]

While commentators outside the U.S. have indicated that it might be inappropriate to undertake a wholesale transplantation of U.S.-style class actions into non-U.S. legal systems, they have acknowledged that the U.S. system has some merits, such as acting

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international standards and that awards resulting from class arbitrations should be found enforceable to the same extent as bilateral awards.

353 *Id.* rec. 3(b).

354 New York Convention, *supra* note 1, art. V(1)(c).

355 *See supra* note 350 and accompanying text.

356 *See* Dreyfuss, *supra* note 32, at 6–7 (discussing approaches taken by foreign courts).

357 *Id.* at 6.

as a deterrent and increasing access to justice for consumers.[358] However, these commentators still express deep-seated concerns about the nature of individual procedural rights in representative litigation,[359] particularly those that are based on essential rights of defense protected by domestic constitutions.[360] For example, Italian courts have determined in the context of actions to enforce foreign judgments that the "right of defense"—such as the right to oppose an action for the protection of one's interests—is an expression of Italian procedural policy and one of the "supreme principles of the constitutional system."[361] The same view exists as a matter of Spanish constitutional law.[362] In Italy, the adversary process principle (*principio del contraddittorio*) requires that the parties have a real opportunity to advocate their positions at every stage of the proceedings.[363] Defendants, in particular, must have the right to challenge the legal and factual claims asserted against them.[364] When considering whether to enforce foreign judgments, Italian courts will not look to see if the procedures of the foreign court are the same as those used in Italy; instead, the Italian courts will look at "the concepts that inspire the [Italian] legal system and, more precisely, . . . the fundamental principles recognized by the legislature to be necessary conditions for the very existence of society."[365] To be upheld, the foreign judgment must have been issued by a proceeding that "substantially guaranteed the parties an adequate opportunity to be heard" and "honored the essential rights of defense of all the parties . . . throughout the duration of the proceeding."[366]

This reading of Italian courts' predilections regarding enforcement of foreign judgments could signal trouble for anyone attempting to enforce a class arbitration award in Italy or in any jurisdiction that adopts a similar approach to the rights of defense. For example, a class arbitration—like a class action—"might impair

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[358] *Id.* at 8; *see also* Taruffo, *supra* note 32, at 412–13 (detailing various issues European countries may have wiith the U.S. class action system).

[359] Dreyfuss, *supra* note 32, at 9–10; Taruffo, *supra* note 32, at 415.

[360] Dreyfuss, *supra* note 32, at 17.

[361] *Id.*

[362] Cairns, *supra* note 15, at 593.

[363] Dreyfuss, *supra* note 32, at 19, 25.

[364] *Id.* at 19.

[365] *Id.* at 26 (internal citations omitted).

[366] *Id.* at 26.

the defendant's ability to ascertain necessary information and might deprive the defendant of the opportunity to develop essential elements of defense with which to confront the claimants," particularly if the class arbitration procedure "treats discrete claims as fungible claims," which might offend the principle both of defense and of the opportunity present evidence.[367] Because a class action and a class arbitration "might hold an Italian defendant liable for damages to unknown or unidentified plaintiffs despite the defendant's inability to challenge their individual claims," an Italian court might refuse to enforce a judgment or arbitral award.[368] Interestingly, the same problem might not exist in actions to enforce a class award providing injunctive or declarative relief only, since the injury to one party is the same as the injury to any other named or unnamed party.

The Italian view is not universal. As discussed above, other state courts have found U.S. class proceedings inoffensive to the enforcing state's public policies. In particular, England—which does not have a particularly robust view of representative actions and resembles civil law systems to some extent—has found that U.S. class actions do not violate principles of natural justice and will thus enforce class judgments.[369] The issue will therefore likely come down to how each state views the legitimacy of representative proceedings and the type of relief requested. However, the argument here is that all states should give full effect to the provisions of the New York Convention and adopt a pro-enforcement stance even for class awards.

5. INTERNATIONAL CLASS AWARDS MERIT EQUAL TREATMENT WITH OTHER ARBITRAL AWARDS

The preceding discussion has demonstrated the manner in which objections to the enforcement of international class awards will likely arise. Some parties may claim that international class arbitration violates proper arbitral procedure, primarily focusing on due process concerns to advance their position.[370] Other parties

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[367] *Id.* at 27.

[368] *Id.*

[369] *See supra* notes 112–15 and accompanying text.

[370] *See supra* notes 253-305 and accompanying text. This Article has focused on procedural arguments related to due process and public policy, since those arguments are rooted in fundamental state concerns. Other procedural arguments, which focus more on party autonomy, are akin to those used to

may focus on public policy, claiming that enforcement of a foreign class award will result in a radical—and unacceptable—reconceptualization of individual procedural rights.[371] Because the New York Convention permits objections to enforcement based on both due process and public policy, such claims are—on their face—legitimate grounds for non-enforcement of a foreign award.[372] Furthermore, due process and public policy—particularly concerning the shape and scope of individual procedural rights—are very much within the purview of national constitutional law, and may, as such, be given heightened respect and weight during enforcement proceedings as mandatory provisions of law.[373] Nevertheless, parties should not be able to enter blanket objections to class awards based on the special nature of class or representative proceedings. Instead, foreign class awards should be evaluated on a case-by-case basis, using the same standards as are used with non-class awards, for two reasons.

First, the pro-arbitration policy of the New York Convention indicates that courts are to adopt a presumption in favor of enforcement.[374] Only in extreme cases are courts permitted to interfere with the arbitral process by refusing enforcement after its conclusion on the merits.[375] Many states—including several civil law nations that might otherwise be expected to object to representative actions as violative of national conceptions of individual procedural rights—have adopted robust pro-arbitration policies and should, therefore, be expected to live up to those enunciated positions by upholding class awards.[376] Furthermore,

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oppose consolidation of arbitrations and are outside the scope of this Article. *See generally* Strong, *supra* note 13.

371 *See supra* notes 306–69 and accompanying text.

372 New York Convention, *supra* note 1, arts. V(1)(b), V(2)(b).

373 *See supra* notes 277–84, 360–69 and accompanying text; *see also* LEW ET AL., *supra* note 16, paras. 5-68 to 5-72 (describing the principle underpinning the "*magna carta* of arbitration").

374 Park & Yanos, *supra* note 2, at 254, 259.

375 LEW ET AL., *supra* note 16, paras. 26-65 to 26-70. Of course, judicial interference during the arbitral process is even more unwelcome, with the exception of measures necessary to uphold the arbitrator's authority. *Id.* paras. 5-35, 15-5 to 15-55 (explaining how courts may become involved with arbitration awards).

376 Of course, this Article is not suggesting that a general policy in favor of arbitration should result in universal enforcement of all arbitral awards. There are legitimate violations of due process and public policy that would and should forestall enforcement of a class award, just as there are areas of law that a state

the policy reasons supporting international arbitration are consistent with policy reasons in favor of class treatment of certain claims. Thus, as a matter of policy, international class awards should be accorded the same presumptions of enforcement that are given to other international awards.

Second, the detailed analysis of the due process and public policy objections under article V of the New York Convention undertaken above demonstrates that objections based only on the special nature of class arbitrations are inappropriate. While a full-fledged comparative analysis of the national law of each of the 140-plus signatories to the New York Convention is beyond the scope of this Article,[377] international commercial arbitration is an area that is both (1) particularly needful of harmonization and (2) particularly amenable to the persuasive power of expert commentary.[378] Therefore, the generally accepted international standards that have developed as a result of commentary, case law and legislative enactments concerning objections under articles V(1)(b) and V(2)(b) of the New York Convention should be applied to class awards to the same extent that they do to bilateral awards. As discussed further below, these standards indicate that blanket objections to international class arbitrations that are based only on the unique nature of representative proceedings should not be permitted.

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may deem non-arbitrable. Arbitrability is typically considered under article II of the New York Convention. New York Convention, *supra* note 1, art. II; *see also* LEW ET AL., *supra* note 16, paras. 9-1 to 9-5 (discussing the concept of arbitrability). Concerns regarding arbitrability can overlap with public policy arguments under article V(b)(2) of the New York Convention. *See, e.g.*, *id.* para. 9-4 (describing both "objective arbitrability" and "subjective arbitrability"); Böckstiegel, *supra* note 313, at 179 (describing notions of abitrability in Latin America and Western European countries). However, objections based on article II of the New York Convention, including those relating to arbitrability, are outside the scope of this Article.

377 Such an analysis might not, in any case, yield much useful information, since many state parties to the New York Convention do not have any reported decisions concerning the construction of the New York Convention. Harris, *supra* note 255, at 21–22.

378 Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1338 (2003). The persuasive power of scholarly commentary is a hallmark of the civil law tradition. *Id.* at 1340–41. International commercial arbitration has embraced this perspective, giving scholarly writings more weight in legal arguments than is perhaps the case in common law courts. *Id.*; *see also* S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES (forthcoming 2009); Gidi, *supra* note 20, at 325, n.24 (stating that scholars, not judges, are the preeminent figures of the civil legal tradition and listing various sources supporting the same).

5.1. International Class Awards Should Be Upheld as a Matter of General Policy

This section considers two separate policies: those supporting international arbitration and those supporting class or representative treatment of certain types of claims. Legitimate concerns about the propriety of international class arbitrations could arise if the two policies were inconsistent. However, analysis shows that both policies attempt to achieve similar ends, indicating that international class awards should be treated in the same manner as non-class awards.

5.1.1. Policies Supporting International Arbitration

The New York Convention is "one of the most successful commercial treaties in history," with over 140 states having become parties through ratification, accession or succession.[379] Commercial entities submit a vast range of disputes to arbitration, allowing private individuals, rather than courts, to resolve disputes worth billions of dollars.[380] Furthermore, a "significant majority of corporations" prefers to have its cross-border disputes resolved through arbitration rather than through litigation.[381]

There is no indication that international arbitration is more popular in common law countries over civil law countries or vice versa, suggesting that support for arbitration is based on something other than the expectation that the procedures will either (a) benefit parties from one legal tradition over another or (b) mimic one's home system.[382] Indeed, the common expectation

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[379] Park & Yanos, *supra* note 2, at 257.

[380] Joseph T. McLaughlin, et al., *Recent Developments in Domestic and International Arbitration Involving Issues of Arbitrability, Consolidation of Claims and Discovery of Non-Parties*, *in* SM090 ALI-ABA 757, 759 (2007); *see also* Sternlight & Jensen, *supra* note 13, at 75 (noting that an increasing number of companies use arbitration clauses to prevent class action suits being brought against them by consumers); Weston, *supra* note 20, at 1714–15 (claiming that companies are increasingly submitting their disputes to arbitration).

[381] McLaughlin et al., *supra* note 380, at 759. For further discussion of the extent to which international contracts include arbitration clauses, see Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of* Ex Ante *Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 347, 351–52 (2007) (describing statistics concerning incidence of arbitration clauses in a variety of contracts, including international contracts).

[382] Over the years, international commercial arbitration has come to adopt procedures that incorporate both civil law and common law traditions, which is one of the reasons why it has become so popular. LEW ET AL., *supra* note 16, paras.

and, in many cases, hope is that arbitration will not be identical to judicial resolution of the dispute.[383] Innovation and flexibility are not only permitted in international arbitration, they are affirmatively encouraged.[384] Many esteemed arbitrators and advocates have recognized that it is good arbitral practice for each proceeding to be individually tailored to the needs of the parties.[385] Thus, the mere fact that class arbitration is an unusual procedure from some parties' or nations' perspective is not problematic in itself. An arbitration can be unusual and still be entirely proper under both the arbitration agreement and the relevant procedural law.

When signing on to the New York Convention, states are on notice that a pro-arbitration—including a pro-enforcement—stance is the norm.[386] Much of the operative language is in mandatory terms: article II states "[e]ach Contracting State *shall* recognize an agreement in writing" to arbitrate, while article III states "[e]ach Contracting State *shall* recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[387] Language permitting deviations from the general pro-enforcement stance is couched in

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21-32 to 21-39 (describing elements of common and civil law procedures in international arbitration). Despite the absence of any visible preference for international arbitration based on a civil law-common law divide, Gary Born has noted that:

> [i]n some developing and other countries, there has been a perception that international commercial arbitration was developed by, and was biased in favor of, Western commercial interests. As a consequence, national law in many countries was historically hostile towards international arbitration. In some states, this remains the case today. . . . In general, this hostility has waned somewhat . . . , with many states acceding to the New York Convention and enacting "pro-arbitration" legislation.

BORN, *supra* note 223, at 8 (citation omitted).

383 LEW ET AL., *supra* note 16, paras. 1-9, 1-13 to 1-18 (describing procedural differences between litigation and arbitration).

384 Weidemaier, *supra* note 8, at 96.

385 *See, e.g.*, LEW ET AL., *supra* note 16, para. 1-15 (describing how variations in form, structure, and procedure may arise in different arbitrations); Weidemaier, *supra* note 8, at 95–98 (arguing that class arbitration would benefit from the implementation of "innovative procedures that courts have been hesitant to accept").

386 *See* BORN, *supra* note 223, at 21 (explaining the purpose of the New York Convention and the general requirements it imposes on its signatories).

387 New York Convention, *supra* note 1, arts. II–III (emphasis added).

permissive, rather than mandatory, terms. Therefore, although "[r]ecognition and enforcement of the award *may* be refused" on the request of a party, such refusal is permitted *only* on five specific grounds, even assuming that the court is so inclined.[388] "Recognition and enforcement of the award *may also* be refused" by a competent authority on two other grounds, including public policy.[389] However, even these limited grounds for objection to enforcement may be further restricted, since, under article VII of the New York Convention, a party wishing to enforce an award may rely on other international agreements or on national law that would make it easier to obtain enforcement (a principle known as the "most favorable provision" doctrine, in that a party seeking enforcement can proceed under the principle of law most favorable to it).[390]

Although this is not the place to discuss the depth of dedication with which individual states promote the enforcement of foreign arbitral awards, it is sufficient to note that different states support international arbitration to different degrees.[391] It can also be said that a strongly pro-arbitration stance can be found in a number of states that are active in international commerce, including the United States, the United Kingdom, Canada, The Netherlands, France, Italy and Switzerland.[392] Furthermore, research suggests that the more a country wants to become active in international commerce, the more likely it is that the courts and/or legislature of that country will adopt a pro-arbitration stance, since the inability to obtain reliable enforcement of an arbitral award typically leads international commercial actors to avoid business dealings with

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[388] *Id.* art. V(1) (emphasis added).

[389] *Id.* art. V(2) (emphasis added).

[390] *Id.* art. VII; *see also* LEW ET AL., *supra* note 16, para. 6-44 (explaining the most favorable provision doctrine). For example, the French interpretation of article VII of the New York Convention means that parties wishing to enforce a foreign arbitral award in France will not be faced with an objection based on article V(1)(e), since the French statute authorizing enforcement does not permit objections on those grounds in either domestic or international enforcement actions. *See* Pabalk Ticaret v. Norsolor, 24 I.L.M. 360 (1985) (construing article VII of the New York Convention in conjunction with article 12 of France's New Code of Civil Procedure); REDFERN & HUNTER, *supra* note 1, paras. 10-71 to 10-72.

[391] *See* BORN, *supra* note 223, at 29–30 (describing how vestiges of historical suspicion and hostility towards arbitration can remain in certain countries' legal traditions).

[392] *Id.* at 30.

entities based in that state.[393] As a result, "[l]eading international arbitration conventions and national law [both] provide for the presumptive enforceability of arbitration agreements."[394]

It is true that some states have demonstrated a "historic distrust" regarding international arbitration, and although that distrust has waned, courts in those countries may still refuse to enforce international awards based either on a philosophic opposition to international arbitration or as a result of requests by individuals, companies or state entities that would be injured as a result of a pro-enforcement stance.[395] Nevertheless, "[a]n important aim of the Convention's drafters was uniformity: they sought to establish a single, stable set of international legal rules for the enforcement of arbitral agreements and awards," thus suggesting that narrow, nationalistic approaches to international arbitration are inappropriate under the New York Convention.[396]

Most of the rationales supporting a pro-arbitration policy are commercial, at least in the international realm.[397] For example, international arbitration facilitates international commerce because the existence of enforcement treaties such as the New York Convention[398] gives parties some assurance that they can recover damages from entities located in other countries.[399] Prior to the widespread enactment of international arbitration treaties, commercial actors had to subject their disputes to the vagaries and

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393 *Id.* at 29–30; *see* Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L. & ECON. 371, 372–74 (2004) [hereinafter Drahozal 2] (arguing that the number of arbitrations in a given country increase upon the enactment of a new or revised arbitration law).

394 BORN, *supra* note 223, at 5.

395 *Id.* at 29–30.

396 *Id.* at 23.

397 William W. Park, *The International Currency of Arbitral Awards*, 756 PLI/Lit 309, 360 (2007); *see also* Drahozal 2, *supra* note 393, at 374, 382–83 (noting those who promote new or revised arbitration statutes claim economic benefits will result; finding some empirical support for that position, albeit not to the extent commonly believed).

398 Again, the New York Convention is only the best known of many multilateral and bilateral enforcement agreements. *See generally* New York Convention, *supra* note 1.

399 BORN, *supra* note 223, at 7–10, 19. Interestingly, the reverse may also be true—that the New York Convention's success is based on the fact that it came into being "in the 1960s and 1970s, as world trade and investment began significantly to expand. With this expansion came substantially greater numbers of international commercial disputes—and arbitrations—which gave practical utility to the Convention." *Id.* at 22.

possible biases of national courts.[400] Although parties could attempt to sidestep rogue courts through choice of forum clauses, those clauses were not always upheld.[401] Furthermore, an international actor still had to deal with those courts when it came time to enforce a judgment.[402] Even the most reputable courts were still under no duty to enforce a judgment arising out of a foreign court, since no widespread multilateral treaties existed for the enforcement of judgments and requests to enforce a foreign judgment typically turned on the principles of comity.[403]

Thus, international arbitration—with its easy enforcement mechanisms—became the preferred route for dispute resolution in the international commercial field.[404] With arbitration came a number of collateral benefits for international actors. For example, parties to an arbitration not only avoid the biases of national courts, they also avoid procedural quirks that might give one party a home court advantage.[405] The procedure and location of an arbitration is often chosen to provide as neutral a playing field as possible.[406] Furthermore, the flexibility of arbitration allows parties to enjoy a procedure that is "tailor made" for their dispute and may result in a savings of cost and time.[407] This sort of innovation and lack of formalism is particularly appropriate and appreciated in international matters, where the legal and business cultures of the parties and/or arbitrators can sometimes vary widely and where a pragmatic, rather than legalistic, approach is highly valued.[408]

If the underlying rationale behind international commercial arbitration in non-class situations is the creation of a flexible, pragmatic international dispute resolution mechanism that will encourage international commerce and investment, then the question is whether international class arbitration supports or conflicts with that position. If international class arbitration is consistent with the aims and goals of international bilateral

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400 Park, *supra* note 397, at 360.

401 *Id.*

402 *Id.*

403 *Id.*

404 BORN, *supra* note 223, at 10.

405 *Id.* at 2, 8.

406 *Id.* at 9.

407 *Id.* at 7–9.

408 *Id.* at 2.

arbitration, then states should support the enforcement of international class awards. To do otherwise would (a) create a hierarchy of "acceptable" types of international arbitrations, creating a precedent for other types of exceptions to enforcement based on grounds other than those contained within the New York Convention; and (b) create confusion and conflict in the international realm and diminish the aim of uniformity across jurisdictions, since enforcement of class awards will be presumptively permitted in some states (such as the U.S., Canada, Australia and England) and not in others (such as most civil law states, with the possible exception of Brazil).[409] Indeed, if international class arbitration were shown to conflict with the aims and goals of other forms of international arbitration, then enforcement of class awards should not be presumed. As it turns out, international class arbitration is in fact consistent with the policies and aims of international bilateral arbitration.

5.1.2. Policies Supporting International Class Arbitration

It is true that class arbitration is not universally embraced by either the legal or business community, even within the United States, where it is most common.[410] Indeed, a split in support even can be seen with respect to judicial class actions, which are the predecessors for class arbitrations.[411] On the one hand, class actions—and class arbitrations—result in a number of advantages, some of which are based on efficiency (often a pro-business rationale) and others of which are based on justice. For example, class proceedings in both courts and arbitration include the following benefits:

- The reduction of discovery and pre-hearing procedures, leading to savings of cost, effort and time.
- The presentation of all legal and factual disputes to one decision maker, which (a) increases the likelihood of reaching the "right" result; (b) decreases the likelihood of additional dispute resolution proceedings, thus allowing defendants to get on with their business affairs; and (c) creates the possibility of a single global

409 *See supra* text accompanying notes 102–21.

410 *See supra* text accompanying note 24.

411 *See supra* text accompanying notes 51–52.

settlement which may be more realistic and which may avoid bankrupting the defendant.

- Consistency of results for both claimants and defendants.
- To the extent that (a) contingent or conditional fees are allowed or (b) fee shifting is limited or restricted, the possibility that claimants will bring an action that would not have been otherwise brought.
- Perhaps most importantly, at least from a social justice standing, the ability to permit recovery for small individual claims suffered by persons who might not have known they were injured and almost certainly would not have sought recovery even if they had known of their injury. In theory, requiring defendants to pay the entire social cost of their wrongdoing should avoid much of the reason for high punitive damages, which are suspect in many jurisdictions.[412]

Many of these benefits inure to both defendants and claimants, though it is certainly true that many corporate defendants oppose any mechanism—including class actions and class arbitrations—that make it easier for claimants to bring claims against them, since fewer awards paid to claimants increases the company's profits.[413] Furthermore, it is true that many of the benefits rely on efficiency arguments which, in the realm of multiparty arbitration, have not been universally adopted as a means of overcoming the traditional view of arbitration as a bilateral, contractual construct. Nevertheless, there are those in the international arbitral community who have supported efficiency as a proper consideration in multiparty actions, albeit not a controlling one.[414] In fact, commercial efficiency is—in many ways—a core goal of international commercial arbitration. For example, arbitration has long been touted as a more efficient means of resolving both domestic and international commercial disputes than is

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[412] LEW ET AL., *supra* note 16, para. 16–92; *see* Sternlight, *supra* note 3, at 28 (describing the nature and benefits of a class action); Weinstein, *supra* note 60, at 172–75 (same); Weston, *supra* note 20, at 1727 (same).

[413] *See* Sternlight, *supra* note 3, at 5 (arguing that corporate defendants are averse to class proceedings).

[414] *See* LEW ET AL., *supra* note 16, paras. 16-92 to 16-93 (noting circumstances in which multiparty arbitration may be warranted); Kaufmann-Kohler, *supra* note 255, at 1321 (claiming efficiency is becoming one of the primary goals of arbitration).

litigation.[415] Additionally, the passage of the New York Convention was based on efforts to increase international commerce by making both the dispute resolution process and the enforcement of any resulting awards more efficient.[416] Thus, the efficiency rationale of international class arbitration is particularly consistent with the international arbitration regime, even aside from the social justice claims.

Of the various efficiency arguments, one requires particular attention. The business community's need and desire for transnational consistency is particularly important in areas of law (such as consumer or employment law, two common areas for class arbitration) that are heavily regulated at the national or regional level. As the recent decision by the European Court of First Instance in the Microsoft competition case has shown, it is possible for a multinational corporation to be subject to diametrically opposing legal requirements that could prove costly (to both the business and the end consumer) or even fatal to that corporation's ability to do business in a particular state or region.[417]

International class arbitration also addresses a concern that has received a great deal of attention in U.S. arbitration circles, namely the "repeat player" syndrome.[418] The premise of the repeat player syndrome is that corporate defendants—particularly in the consumer and employment fields, two areas that generate a large number of small, individualized claims—experience an allegedly higher number of favorable judgments in individual (bilateral)

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[415] BORN, *supra* note 223, at 9–11.

[416] *Id.* at 8.

[417] U.S. Department of Justice, *European Microsoft Decision Could Discourage Competition*, Sept. 17, 2007, http://useu.usmission.gov/Dossiers/Antitrust/Sep1707_Barnett_Microsoft.asp (noting discrepancies between European and American rulings on Microsoft's allegedly anticompetitive conduct).

[418] *Compare* Sternlight & Jensen, *supra* note 13, at 75–76, 92 (discussing problems associated with class arbitration in consumer context) *with* Ware, *supra* note 130, at 274–76 (discussing contracts of adhesion in class arbitration context), *and* Weidemaier, *supra* note 8, at 71–81 (addressing the benefits to repeat players in arbitration). *See also* Lisa B. Bingham, *Self-Determination in Dispute Resolution Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 889 (2002) (noting a "pattern of results [that] tended to contradict assertions of systemic bias in favor of employers in employment arbitration"); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 231, 233 (1998) (discussing Equal Employment Opportunity Commission's contention "that mandatory arbitration has a built-in bias for the employer who is a repeat player" in light of empirical data revealing no systematic pro-employer bias).

arbitrations because (1) arbitrators tend to side with the parties who are more likely to provide the arbitrators with future business, i.e., the corporations who often retain the right to name the arbitrators and who are faced with a large volume of nearly identical claims, and (2) repeat players gain a large amount of intellectual capital concerning the best way to present their case over time, as opposed to one-off parties who may or may not have legal representation.[419] The problem is particularly troubling in many commentators' minds because many of the arbitrations in which the repeat player syndrome occurs involve mandatory arbitration clauses that are imposed by large corporations on smaller, weaker individuals.[420]

However, the repeat player syndrome might in many ways be resolved by permitting class arbitration, including international class arbitration. For example, by combining the majority of claims into a single action, the corporate defendant will not experience any of the "repeat player" benefits, such as:

- a facility with the procedure gained through repeat procedures, since the class procedure will likely be *sui generis* and will not, in any event, be repeated regularly;
- utilizing experienced counsel with superior knowledge of the facts and/or law at issue, since the claimants in a class proceeding will be represented by more sophisticated counsel than is often true in individualized employment or consumer arbitration, where the claimant may not be able to afford to hire any legal representation, let alone sophisticated counsel;
- the ability to chose an arbitrator that is predisposed to the defendant's case, at least in cases involving the AAA Supplementary Rules, since that rule set requires at least one arbitrator to be named from the AAA

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[419] Weidemaier, *supra* note 8, at 71–81. The repeat player problem is less of an issue outside the U.S. because some jurisdictions do not permit pre-dispute arbitration clauses in consumer cases. Drahozal & Friel, *supra* note 97, at 372–73. Although some states may consider employment and consumer disputes to be "non-commercial" and thus potentially outside the New York Convention, objections based on due process and public policy may arise through other means. *See supra* notes 38-40 and accompanying text.

[420] Weidemaier, *supra* note 8, at 69. It is precisely these kinds of mandatory arbitration clauses that courts outside the United States will likely find most problematic (and hence presumptively unenforceable). Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEVADA L. REV. 341, 360 (2007) [hereinafter Rogers 2].

national roster of class arbitration arbitrators, thus inserting an increased level of impartiality by virtue of the limited number of potential arbitrators;[421] and

- a presumption that the arbitrator will side with the repeat player, since (a) there is only one proceeding and thus little likelihood of repeat business and (b) there may be increased national or international scrutiny of the award and proceedings; in particular, international standards regarding the impartiality and independence of arbitrators[422] suggest that arbitrators in international actions will be dutiful in protecting their impartiality and independence.[423]

Furthermore, if the presumed benefit to the repeat player had actually ensued, the corporate defendant would not be subject to an enforcement action, since the corporate defendant would have prevailed.

However, class proceedings–both judicial and arbitral–have their downsides. For example:

- Class proceedings are more complex than bilateral proceedings, both in terms of procedural issues and legal issues.

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[421] AAA SUPPLEMENTARY RULES, *supra* note 7, rule 2(a). The JAMS Class Arbitration Rules contain no similar provision. Furthermore, corporate defendants faced with a class arbitration are more likely to want an arbitrator with strong experience in class proceedings, rather than someone who is simply their arbitrator "on call," since procedural errors could result in an invalid award.

[422] *See* LEW ET AL., *supra* note 16, paras. 11-1 to 11-52 (discussing the impartiality and independence of arbitrators). A detailed analysis of international standards of impartiality is outside the scope of this Article, but documents such as the International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration* have been very useful in flushing out the types of relationships and situations that can provoke challenges for lack of independence or impartiality in international arbitrations. IBA Guidelines of Conflicts of Interest in International Arbitration, http://www.ibanet.org/images/downloads/guidelines%20text.pdf (last visited Oct. 18, 2008) [hereinafter IBA Guidelines]; s*ee also* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 55 (2005) (suggesting regulatory framework to improve the standards of conduct among arbitrators) [hereinafter Rogers 3]. The IBA Guidelines help demystify the issue of arbitrator bias by creating a hierarchy of potentially problematic relationships that might give rise to claims of personal, professional or financial self-interest. *See generally* Rogers 2, *supra* note 420, at 377 (noting differences between domestic and international perspectives on ethical issues).

[423] *See* Weidemaier, *supra* note 8, at 69–81 (describing the "individuation critique").

- Representative actions raise unusual ethical pressures due to the different nature of the client-attorney relationship.
- Mass actions may force settlement, even when the claims are baseless, because of the threat of huge awards.[424]
- Class and representative proceedings create concerns about the adequate protection of the rights of absent class members, even in those jurisdictions that embrace representative actions.[425]

Some of these concerns—particularly the first—cut against any efficiency arguments that can be made in favor of international class arbitration, while others challenge the claim that class proceedings promote social justice in a way that is difficult or impossible in bilateral proceedings. However, the most compelling argument against class or representative proceedings—i.e., that such actions do not adequately protect the rights of absent class members in either the arbitral or judicial context—is one that is squarely addressed by the New York Convention, primarily through the public policy exception under article V(2)(b). That issue will be discussed below.

The other policy-based argument that could be used to oppose class arbitrations concerns the contractual nature of arbitration. Parties can—and have—argued that efficiency and social justice arguments in favor of class arbitration cannot overcome the contractual basis of arbitration.[426] However, international commercial arbitration recognizes that arguments based on contract do not always prevail. For example, mandatory rules of law will prevail over party autonomy; non-signatories may occasionally be bound to an arbitration agreement, often based on concerns sounding in equity and despite the lack of strict contractual privity; and consolidation may be ordered in some

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[424] In fact, settlement of both class arbitrations and class actions are quite likely, though perhaps more so in U.S.-style class actions, since American-style discovery is expensive and time consuming. Because unwarranted settlements raise the cost of doing business (which is eventually passed on to the consumer), there is a social cost associated with baseless class proceedings.

[425] Smit, *supra* note 13, at 210; Sternlight, *supra* note 3, at 34–37; Weinstein, *supra* note 60, at 172–74.

[426] Strong, *supra* note 13, *passim.*

cases even over the parties' objections.[427] While these examples are the exception rather than the rule, opponents to class arbitration cannot claim that the strict terms of the contract will or should prevail in all circumstances. Furthermore, courts and arbitrators have been able to construe arbitration agreements to permit class proceedings without having to do violence to established notions of party autonomy.[428]

Thus, as a general matter, policies in favor of international commercial arbitration also favor international class arbitration. The policies—including both efficiency and social justice concerns—do not line up one hundred percent in class arbitration's favor, but they do provide significant support. Furthermore, if certain types of arbitral proceedings were excluded from the New York Convention's presumption of enforceability based, not on the grounds contained within the New York Convention, but rather on other, more general arguments, it would undercut the certainty and predictability that are both the aims of and foundation for international commercial arbitration. Thus, the overwhelming trend towards pro-arbitration policies—and the need for a uniform approach to enforcement of international awards—indicates that international class awards should be treated in the same manner as awards arising out of bilateral arbitrations.

5.2. International Class Arbitrations Should Be Upheld Under the New York Convention

The general policy arguments discussed in the preceding section indicate that international class awards should be given the same presumption of enforceability as other international awards. A similar conclusion is reached under the specific provisions of the New York Convention.

5.2.1. Due Process Objections Cannot Provide a Blanket Prohibition on Class Arbitration

Different states have different views about the proper parameters of due process, which could lead to confusion in

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[427] *See* LEW ET AL., *supra* note 16, paras. 7-33 to 7-58, 16-50, 16-70 to 16-78, 17-8 to 17-10, 17-22 to 17-26 (discussing limits on party autonomy).

[428] *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003) (plurality opinion) (noting, for example, that named and unnamed class members consented to the named arbitrator by virtue of their continuing in the class).

enforcement actions. However, courts considering objections to enforcement under article V(1)(b) of the New York Convention are supposed to use the standards of the state whose procedural law controlled the arbitration (typically the law of the seat of the arbitration).[429] This is helpful to courts faced with motions to enforce international class awards for two reasons. First, most class arbitrations in the next few years will likely be seated in jurisdictions that already permit some form of representative action in their national courts and perhaps also in arbitration. Because those states have already resolved many of the due process issues raised by representative proceedings, parties to international class arbitrations would find it difficult to advance any sort of blanket due process objections to class arbitration under the law of those jurisdictions.

Second, the two major areas of concern regarding due process—notice and the ability to present one's argument—are actually not as problematic in practice as they are in the abstract. For example, both of these due process concerns are met—at least as a matter of U.S. law, which will apply in many of the early international class arbitrations—through the use of the AAA Supplementary Rules or, to a lesser extent, the JAMS Class Arbitration Rules.[430]

Furthermore, both of these due process concerns are more likely to be problematic from the claimants' perspective than the defendant's perspective, meaning that it is perhaps less likely that they will be raised in an international enforcement action. For instance, commentators have questioned the ability to provide effective notice to absent claimants who may not receive or understand a notice provision and the ability of those claimants to participate in the conduct of the proceedings.[431] However, actions to enforce an international arbitral award will primarily be to enforce an award of damages or an injunction against a corporate defendant, and notice to a corporate defendant is typically readily achieved and readily proven. Furthermore, a corporate defendant is likely to have sophisticated counsel that will represent the corporation's needs more than adequately. Although it is possible that a corporate defendant could argue that it did not have the

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[429] Inoue, *supra* note 269, at 247; *see also* O'Hare, *supra* note 139, at 184 (noting that forum state's due process standard should be applied).

[430] *See supra* notes 166–222 and accompanying text.

[431] ROTHSTEIN & WILLGING, *supra* note 69, at 19.

ability to present an individualized defense to each claim due to the sheer number of unspecified individual claimants in a class arbitration, this objection would most likely arise in the context of a public policy argument and will be discussed below. It is also conceivable that a corporate defendant could claim that inadequate notice left the corporation open to future claims from non-named parties, but that sort of objection appears too speculative, particularly if it is not brought up during the proceedings.[432] This sort of objection also reverses the parties' roles to some extent, allowing the defendant to advance what is really the claimant's argument (*i.e.*, that inadequate notice injured the claimant in some way).

There is one way that due process can become a problem even in international class arbitrations that are governed by the law of a class-friendly state. As mentioned above, some states take the view that violations of due process rise to the level of a public policy concern, thus permitting the application of the enforcing state's laws.[433] While this sort of interpretation is improper, it has happened on occasion.[434]

5.2.2. Public Policy Objections Cannot Provide a Blanket Prohibition on Class Arbitration

Objections based on public policy are more problematic than objections based on due process. First, some due process concerns, such as the right to defend against a claim, can be considered so fundamental to a state's constitutional regime that they are transformed into public policy concerns, allowing the standards of the enforcing state to apply rather than the standards of the state whose procedural law governed the arbitration. This type of shift could, for example, allow state constitutional concerns about the defendant's right to confront each and every absent claimant to justify non-enforcement of a class award that would otherwise be valid under the procedural law governing the arbitration.

Second, legitimate differences of opinion about the nature of individual procedural rights and the ability to assert a representative claim can rise to the level of a public policy concern. Different states have, for reasons of legal tradition and public

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[432] *See supra* note 368 and accompanying text.

[433] *See supra* notes 277-83 and accompanying text.

[434] *See supra* notes 277-83 and accompanying text.

policy, taken different stances regarding the legitimacy of representative proceedings in court. However, the enforcement of foreign arbitral awards is not analogous to the enforcement of foreign judgments or to the adoption of a foreign dispute resolution mechanism into a state's domestic legal system. First, arbitration permits a number of procedures that would not be permitted in court,[435] so it cannot be expected that all policies applicable to judicial actions would or should apply equally to arbitration. Both the parties—who are understood to have agreed to a procedure that does not slavishly imitate judicial norms—and the states—who have, through national legislation and adherence to multinational treaties such as the New York Convention, permitted the parties to choose those procedures—are operating on the premise that arbitration is not and need not be identical to litigation. Imposing judicial norms on the arbitral procedure is both inappropriate and unnecessary.

Furthermore, enforcement of an arbitral award is inherently different than the adjudication of a dispute; the emphasis during an enforcement action is on whether the process was proper and in accordance with the arbitration agreement, not whether the result and procedure would have been the same under the law and procedure of the enforcing state.[436] Furthermore, enforcement of an arbitral award does not require a court to introduce a foreign and/or disapproved-of form of legal action—*i.e.*, a representative action—into the domestic legal system. The action to enforce an arbitral award is much simpler and was intended to avoid any sort of deeper inquiries into the legitimacy of the legal system that heard the case on the merits. It was that kind of deeper inquiry that made the enforcement of foreign court judgments so difficult and led to the creation of multilateral treaties for the enforcement of arbitral awards.

Presumptions obviously have their limits. Too broad an application of a pro-enforcement presumption would eviscerate the public policy exception altogether, with parties claiming that

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[435] *See* Weidemaier, *supra* note 8, at 95–96 (stating that international class arbitration permits arbitrators to implement innovative procedures that courts are hesitant to accept).

[436] *See, e.g.*, Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd., [1992] 2 All E.R. (Comm) 146 (noting the court was not being asked to enforce the contract, but to enforce an award); Westacre Inv. Inc. v. Jugoimport-SPDR Holding Co., [1999] 2 Lloyd's Rep. 65 (Eng. Civ. App.) (same).

any award issued by an arbitrator should be upheld. As pro-enforcement as the New York Convention is, it certainly contemplates situations where enforcement can and should be denied. However, the New York Convention offers only limited grounds for non-enforcement, and those grounds are to be construed narrowly.[437] Furthermore, objections based on public policy under article V(2)(b) must be based on international rather than domestic public policy. These limitations suggest that the only policies that should be allowed to interfere with the enforcement of international class awards are those that shock the conscience of the international arbitral community.[438] International class arbitration does not rise to that level, even if there are a number of jurisdictions that do not permit representative actions in their national courts. Too many states permit representative actions to support the argument that an international consensus against representative actions exists.

Instead, international public policy bodes in favor of the enforcement of international class awards, since certain economic abuses practiced globally by multinational corporations are likely to continue absent some sort of equally widespread remedy.[439] Of course, this again touches on a sensitive area, since many civil law nations are opposed to allowing individuals to act as "private attorney generals" and prefer to address corporate abuses through domestic or regional legislation.[440] If, however, the injuries are taking place outside the jurisdictional reach of the legislative body, then class arbitration may be the most effective and appropriate remedy. Furthermore, the need to avoid regulatory inconsistency also suggests that class arbitrations, with their single, tailor-made remedies, would be a wise solution to certain transnational ills.

Thus, awards resulting from international class arbitration should be treated as presumptively enforceable, even in countries that do not themselves allow representative actions. Furthermore, the rights of defense are adequately protected in class arbitrations that follow the AAA Supplementary Rules or the JAMS Arbitration

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437 New York Convention, *supra* note 1, art. V; LEW ET AL, *supra* note 16, para. 26–66.

438 *See supra* notes 323–55 and accompanying text.

439 *See* Buschkin, *supra* note 61, at 1588–93 (discussing how international class actions can deter economic abuses by global multinational corporations).

440 Sherman, *supra* note 27, at 418 (describing the European preference for legislative action).

Rules, at least to the extent that a blanket objection to the procedure cannot be upheld.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. Current Status of International Class Arbitration

Four factors indicate that an increasing number of international class arbitrations will be seen in the coming years. First, the United States Supreme Court's recognition of class arbitration as a viable dispute resolution device in *Green Tree Financial Corp. v. Bazzle*[441] and the publication of the AAA Supplementary Rules and the JAMS Class Arbitration Rules mean that class arbitration cannot be seen as an anomalous procedural mechanism limited to a few U.S. states. Indeed, the AAA has been asked to administer over 120 class arbitrations,[442] and many other class arbitrations may be proceeding on an *ad hoc* basis or under the administration of JAMS, which does not publish its class arbitration docket.[443] Second, class arbitration has been considered a potentially acceptable process outside of the U.S., demonstrating that class arbitration is not limited to one country.[444] Third, international commerce and investment continue to rise, meaning that the legal community will face an increasing number of transnational disputes of both a bilateral and multilateral nature. Fourth, international class arbitrations already exist in three different forms: (1) situations where a defendant resides outside the country where the arbitration is seated; (2) situations where a defendant resides in the country where the arbitration is seated, but has significant assets in other countries; and (3) situations where the claimant class includes individuals resident outside the country where the arbitration is seated.[445]

This Article has focused primarily on issues raised by the first two types of international class arbitration, looking at enforcement concerns that do not arise in traditional (bilateral) forms of

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441 539 U.S. 444, 455 (2003) (plurality opinion).

442 Weidemaier, *supra* note 8, at 70.

443 *See, e.g.*, Stolt-Nielsen SA v. Animalfeeds Int'l Corp., 435 F. Supp. 2d 382 (S.D.N.Y. 2006) (concerning a potential ad hoc class arbitration), *appeal docketed* (2d Cir. June 2, 2008); Pedcor Mgmt. Co. v. Nations Pers. of Tex., Inc., 343 F.3d 355 (5th Cir. 2003) (same).

444 *See supra* notes 228–52 and accompanying text.

445 *See supra* note 11 and accompanying text.

international arbitration.[446] When objecting to enforcement on due process grounds under article V(1)(b) of the New York Convention, the matter is considered from the perspective of the seat of the arbitration or the state whose laws govern the arbitral procedure.[447] The two primary objections will be based on notice and the ability to present one's case.[448] However, gross violations of due process can rise to a procedural public policy concern, which might result in the application of the enforcing state's due process standards.[449]

Unlike challenges based on due process, challenges based on either procedural or substantive public policy are considered from the perspective of the state of enforcement in an action under article V(2)(b) of the New York Convention.[450] Procedural public policy concerns include due process issues as well as other matters, such as biased arbitrators or irregularities in the arbitration procedure, that are not unique to class arbitration.[451] Several possible objections to class awards based on substantive public policy concerns exist. For example, challenges might be based on conflicts with fundamental principles of law, including those regarding prohibitions on the abuse of rights, or on awards involving punitive damages and economic policy.[452] The most likely objection to enforcement of international class awards will be based on civil law conceptions of individual procedural rights, which constitute a fundamental principle of constitutional law in some jurisdictions.

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[446] Because the United States is the jurisdiction with (1) the most practical experience in class arbitration and (2) the most pro-class arbitration perspective (in terms of legal and social philosophy), it is likely that most international class arbitrations will be seated in the United States, at least in the near future. However, class arbitrations can be seated elsewhere. *See, e.g.*, *Stolt-Nielsen SA*, 435 F.Supp. 2d at 384 & n.1 (S.D.N.Y. 2006) (concerning a demand for class arbitration where one arbitration clause provided for arbitration in either New York or London). Furthermore, an action to enforce a class award may also arise anywhere in the world.

[447] *See supra* note 269 and accompanying text.

[448] *See supra* note 268 and accompanying text.

[449] *See supra* notes 277–84 and accompanying text.

[450] *See supra* note 309 and accompanying text.

[451] *See supra* note 324 and accompanying text.

[452] *See supra* notes 341-43 and accompanying text.

6.2. International Class Arbitration Going Forward

Although there do not appear to be any reported cases concerning the enforcement of an international class award under the New York Convention, courts faced with a motion to enforce are not deciding an entirely open question of law. Instead, judges can and should be guided by policy and analogous precedent, both of which point to the presumptive enforceability of international class awards. However, because class arbitrations—like any arbitration—can vary significantly in terms of governing law and procedure, courts should be prepared to consider how different variables could affect any arguments made concerning enforceability.

First, some class arbitrations will adopt specialized rule sets specifically formulated for representative proceedings, whereas others will follow more general arbitral rules or proceed entirely *ad hoc*. Though there is no requirement that a class arbitration use any particular set of rules or procedures, enforcing courts should look particularly favorably on proceedings that have adopted a specialized rule set such as the AAA Supplementary Rules or the JAMS Class Arbitration Rules. Whether the rules are used on a binding basis or merely as procedural guidelines, they help structure the arbitration in a way that increases the likelihood that due process concerns are met. Between the two, the AAA Supplementary Rules seem slightly preferable to the JAMS Class Arbitration Rules, except perhaps in cases where the parties have a high need for confidentiality.[453] Although the use of these two rule sets will be most compatible with a class arbitration seated in the U.S. (since the two rule sets are based on the U.S. Federal Rules of Civil Procedure), they can also be used in class arbitrations seated elsewhere. In many ways, the two rule sets are ideal for use in other jurisdictions, since they either meet or exceed the procedural due process requirements of other states that permit representative actions in their national courts. However, neither of the two rule sets appears to take into account the special concerns of civil law jurisdictions that oppose representative actions as a matter of principle, and therefore may not—by themselves—be enough to "save" a class award that is issued out of a jurisdiction that has traditionally demonstrated judicial and/or legislative hostility to representative proceedings. If, however, the arbitrator creates an

[453] *See supra* notes 166–223 and accompanying text.

opt-in (rather than an opt-out) mechanism for claimants who live in nations where representative relief has not been broadly adopted, that might be sufficient to overcome some civil law objections regarding the nature of representative proceedings.

Second, the seat of the arbitration will likely play a role in the presumptive enforceability of a class award, and enforcing courts should look carefully at the sites of the arbitration. Because due process is considered from the perspective of the seat of arbitration or the state whose laws govern arbitral procedure,[454] awards that arise out of a jurisdiction that is amenable to judicial class or representative proceedings stand a good chance of being found enforceable on due process grounds, particularly if the arbitration follows (1) one of the published rule sets or (2) the general procedural dictates of the judicially recognized representative action in that jurisdiction (since those dictates will be considered to comply with domestic, and likely international, notions of due process). Class arbitrations that are seated in the United States are perhaps the most likely to be found to comply with local requirements concerning due process, since both class actions and class arbitrations have been used by domestic disputants for decades and there is no philosophical opposition to representative proceedings in the U.S.

Although the United States is undoubtedly the "safest" jurisdiction in which to seat an international class arbitration, other states may also prove able to produce enforceable class awards. At this point, awards issued out of common law jurisdictions (such as Canada or Australia) that permit broad, U.S.-style representative actions should also meet with few due process objections, particularly if the arbitrators utilize the AAA Supplementary Rules or the JAMS Class Arbitration Rules, which would likely meet or exceed local requirements regarding due process.[455] Enforcing courts may have more trouble with awards arising out of civil law nations and those common law nations that permit only narrow formulations of representative rights,[456] though the most forceful

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[454] Although parties may choose to have their proceedings governed primarily by the procedural law of a state other than the seat of the arbitration, the procedural law of the seat always retains a residual role. *See* Union of India v. McDonnell Douglas Corp. [1993] 2 Lloyd's Rep. 48, 50–51 (distinguishing between "internal" and "external" issues of procedural law).

[455] *See supra* notes 102–15 and accompanying text.

[456] However, some civil law systems—such as Brazil and possibly Colombia and Switzerland—can be considered amenable to representative actions. *See supra*

objections from those jurisdictions will likely arise as a matter of public policy rather than due process.

Third, enforcing courts may find that the type of dispute and/or the type of remedy sought has some bearing on arguments regarding enforceability. For example, if the arbitral cause of action falls into an area that civil law legislatures have considered particularly amenable to collective action—such as consumer protection in the European Union and its Member States[457]—an enforcing court might still be able to find that due process was met, even in a civil law jurisdiction, since limited representative relief for that type of legal harm is already available in the national courts. Similarly, an enforcing court might have fewer problems providing class relief where injunctive or declaratory relief alone were sought (as opposed to individual damages), since injunctive and declaratory relief does not trigger the civil law concern about protecting the defendant's right to face all individual claimants.

Fourth, public policy will doubtless play a role in many enforcement actions, but not necessarily a leading role. Though parties have some flexibility in choosing where to seat their arbitrations, they have less of an ability to "forum shop" when it comes time to enforce their awards. It may be impossible for claimants to avoid countries whose domestic public policies prohibit or limit representative relief, since enforcement decisions are typically based on pragmatic considerations involving the location of assets.[458] When courts in jurisdictions that oppose representative judicial actions as a matter of principle are asked to deny enforcement of a class award, the enforcing court may be tempted to apply domestic notions of public policy, based on the New York Convention's statement that enforcement may be refused if doing so "would be contrary to the public policy of *that* country."[459] Nevertheless, enforcing courts should remember to review any domestic public policy that is to be applied through an international lens. Furthermore, enforcing courts should consider

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notes 116–21 and accompanying text. England has also demonstrated its willingness to enforce judgments arising out of foreign representative actions, despite the fact that England does not itself provide broad representative relief as a matter of national law. *See supra* notes 105–15 and accompanying text.

457 Council Directive 98/27, 1998 O.J. (L 166) 51 (EC).

458 *See* LEW ET AL., *supra* note 16, para. 26–56 (stating that prevailing parties typically seek enforcement in jurisdictions where assets are located and the law on enforcement is most favorable).

459 New York Convention, *supra* note 1, art. V(2)(b) (emphasis added).

that sufficient policy grounds exist to hold that international class arbitrations are presumptively enforceable under the New York Convention.

For example, when considering public policy arguments, enforcing courts should recognize the strong pro-arbitration policies inherent in many national statutes on arbitration, as well as in international enforcement mechanisms such as the New York Convention. The fact that a national court would have decided the matter differently than the arbitrator did is no barrier to enforcement. Indeed, as the Queen's Bench Commercial Court stated when ruling to enforce an award based on a contract that would be unenforceable in English courts under English law, "the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced."[460] The court went on to state that "[i]t is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view."[461] While this language is taken from one national court, the view that courts ought not go behind an arbitral award in an action under the New York Convention except in the most extreme situations is shared by many other nations.[462]

Furthermore, enforcing courts should recognize that, as a general policy matter, the advantages of class arbitrations outweigh the disadvantages, particularly when claimants would be unlikely to arbitrate to recover very small sums. In particular, the policies and goals supporting international bilateral arbitrations also support international class arbitrations.

However, courts do not need to rely solely on efficiency arguments when considering how to treat international class awards going forward. They can also rely on the fact that

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460 Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd., [1999] 2 Lloyd's Rep. 222, 224.

461 *Id.* at 224–225.

462 *See* LEW ET AL., *supra* note 16, para. 26–145 (stating that many national courts apply a concept of international public policy which is usually more restrictive than their domestic public policy); *see also* Park & Yanos, *supra* note 2, at 273 (discussing federal courts' limited role in reviewing arbitral awards under New York Convention).

arbitration is a dispute resolution procedure that is known for its innovation and informality.[463] Thus, procedures that might not be adopted for court use can form the basis of a binding arbitration.[464] Furthermore, international arbitration is known for its amalgamation of civil law and common law procedures.[465] Although class arbitration currently reflects its common law origins, civil law lawyers can and should help shape its future development. If civil law jurisdictions reject the procedure on a wholesale basis, they will not be able to play a role in its evolution.

While civil law jurisdictions have weighed up the policy considerations for and against representative actions differently than common law jurisdictions have,[466] at least in the context of litigation, it cannot be disputed that there are legitimate arguments in favor of allowing representative actions. In fact, there are fewer disadvantages to representative actions in arbitration than there are in litigation.[467] Furthermore, the public policy concerns might be lessened when one considers that parties can be said to have agreed to representative proceedings (either through the initial agreement to arbitrate or through the failure to opt out). Since parties to arbitration are deemed to have bargained for a dispute resolution procedure with fewer due process protections and/or different procedures than litigation, civil law jurisdictions should not intervene in the parties' agreed dispute resolution process based on domestic formulations of rights. This is particularly true when the award results from an arbitration that is governed by procedural and substantive laws other than those of the enforcing state and is consistent with the public policy of that other state or states.

International class arbitration has the potential to address civil wrongs that would otherwise be without remedy and provide relief to individuals who would otherwise be unwilling or unable to enforce their rights. Though courts and commentators will have to monitor the development of this procedure, the international arbitral community should encourage enforcement of class awards on the same terms as other arbitral awards and give international

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463 Weidemaier, *supra* note 8, at 96.

464 *Id.*

465 BORN, *supra* note 223, at 44–47.

466 *See supra* notes 90–121 and accompanying text.

467 *See supra* notes 64–68 and accompanying text.

class awards the same presumption of enforceability as is granted to other awards under the New York Convention.